TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 520.

ANSON ELDRED, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN INSURANCE BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED DECEMBER 11, 1871.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Oshkosh, in said district, on the first Monday (being the third day) of July, A. D. 1871. Present, the Hon. David Davis, associate justice of the Supreme Court of the United States, assigned to said circuit, presiding; and the Hon. Andrew G. Miller, district judge; Charles S. Hamilton, marshal; Edward Kurtz, clerk.

2 Among other the following proceedings were had, to wit:

THE MICHIGAN INSURANCE BANK, PLAINTIFF,
vs.
ANSON ELDRED, ELISHA ELDRED, & URI Balcom, defendants. } At law.

Be it remembered that heretofore, to wit, on the eighth day of June, A. D. 1864, came the above-named plaintiff, by its attorney, Mr. W. I. Butler, and filed its præcipe for a summons against the above-named defendants, as follows, to wit:

Præcipe for summons.

U. S. cir. court, district of Wisconsin.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, and Uri Balcom.

Please issue summons in the above-entitled cause, and make the same returnable, according to law, in an action of trespass on the case, upon promises. Damages ten thousand dollars, ($10,000.)

Y'rs, &c.,

W. I. BUTLER,
Pl'ff's Att'y.

And at the same time filed a bond for costs, according to the rules of court, as follows:

Know all men by these presents, that we, The Michigan Insurance Bank of Detroit, State of Michigan, as principal, and W. I. Butler, of Milwaukee, State of Wisconsin, as surety, are held and firmly bound unto Anson , Uri Balcom, and Elisha Eldred, in the sum of two hundred dollars, to be paid to the said Anson Eldred, Uri Balcom, and Elisha Eldred, their executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals the seventh day of June, A. D. 1864.

3 Whereas a summons, in an action at the suit of the Michigan Insurance Bank aforesaid, hath been issued against the said Anson Eldred, Uri Balcom, and Elisha Eldred: Now, therefore, the condi-

tion of this obligation is such, that if the defendants recover judgment, the plaintiff will pay all costs that may be awarded to the defendants, and all damages which they may sustain by reason of the commencement of said suit, not exceeding the aforesaid sum, then this obligation to be void; else valid.

[SEAL.] THE MICHIGAN INSURANCE BANK,
By W. I. BUTLER, *its Att'y.*

[SEAL.] W. I. BUTLER.

Witness:
JARED THOMPSON, Jr.

(Endorsed as follows:) Approved and filed June 8, 1864.
A. SCOTT SLOAN, *Clerk*,
By JAMES McFARLIN, *Deputy.*

Whereupon a summons issued as follows:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Anson Eldred, Elisha Eldred, and Uri Balcom, to appear before the circuit court of the United States of America for the district of Wisconsin, in the ninth circuit, at the United States court-room, in the city of Milwaukee, on the first Monday of July next ensuing, then and there to answer unto the Michigan Insurance Bank, in a plea of trespass on the case on promises to its damage ten thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this eighth day of June, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

W. I. BUTLER, *Attorney.*

Return to summons.

Summons returned: "Served on the within-named Anson Eldred, by showing him this summons and delivering him a copy thereof, this 13th day of June, 1864.

"D. C. JACKSON, *Marshal.*
"By W. S. JACKSON, *Deputy.*"

Fees, $2 26.

4 JULY 1, 1864.—This day came the plaintiff, by its attorney, and filed its declaration as follows, to wit:

Declaration.

Circuit court of the United States for the district of Wisconsin. Of the September term, A. D. 1864.

DISTRICT OF WISCONSIN, *ss:*

The Michigan Insurance Bank, which is a corporation duly organized and doing business under and by the laws of the State of Michigan, plaintiff in this suit, by W. I. Butler, its attorney, complains of Anson

Eldred, Uri Balcom, and Elisha Eldred, defendants in this suit, who, at the time of the contracting of the obligation and indebtedness hereinafter mentioned, were copartners in trade, under the style and firm of Eldreds & Balcom, and who are citizens of the State of Wisconsin, of a plea of trespass on the case upon promises.

For that whereas one F. E. Eldred heretofore, to wit, on the 12th day of June, A. D. 1861, at Detroit, to wit, at the district of Wisconsin aforesaid, made a certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said defendants, by which said note the said F. E. Eldred promised to pay to the order of the said defendants, by the name of Eldreds & Balcom, sixty days after the date thereof, the sum of four thousand dollars, at the Michigan Insurance Bank, value received, and the said defendants to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterwards, and before the payment of the said sum of monies mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff, and then and there delivered the said note so endorsed to the said plaintiff. And the said plaintiff avers, and in fact says, that afterwards, when the said note became due and payable according to the tenor and effect thereof, to wit, on the fourteenth day of August, A. D. 1861, at the place aforesaid, the said note, with the said endorsement so thereon made as aforesaid, was presented and shown to the said F. E. Eldred, the maker thereof, for payment thereof, who then and there had notice of the said endorsement, and who then and there was requested to pay the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid. But neither the said F. E. Eldred, nor any person or persons on behalf of the said F. E. Eldred, did or would at the said time, when the said note was so presented and shown as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; all of which said several premises the said defendants afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, had notice. By reason whereof, and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified; and being so liable, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay it the said sum of money on the said note specified when the said defendants should be thereunto afterwards requested.

And, for that, whereas the said defendants, on the first day of June, in the year one thousand eight hundred and sixty-four, at the said district of Wisconsin, were indebted to the said plaintiff in the sum of ten thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, in and about the business of the said defendants, and for the said defendants, and at the special instance and request of the said defendants, and also for divers materials and other necessary things by the said plaintiff found, provided, used, and applied in and about that work, at the special in-

stance and request of the said defendants; and being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of the said defendants, and for the said defendants, and had before that time found, provided, used, and applied divers other materials, and other necessary things in and about that business, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendants for the same, when the said defendants should be thereunto afterwards requested; and the said plaintiff avers that the said plaintiff therefore reasonably deserves to have of the said defendants for the same the further sum of ten thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiff in the sum of ten thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise by the said plaintiff before that time
6 sold and delivered to the said defendants, and at the like request of the said defendants. And in the further sum of ten thousand dollars of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of the said defendants. And for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the request of the said defendants. And for other money by the said defendants before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants, although often requested, &c., have

not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, &c.

W. I. BUTLER,
Plaintiff's Attorney.

To the within defendants:

Take notice that the following is a copy of a promissory note which will be offered in evidence on the trial of this cause under the money counts in the within declaration contained.

Yours, &c.,

W. I. BUTLER,
Plaintiff's Attorney.

7 (Copy.)

" $4,000. DETROIT, *June 12th*, 1861.

" Sixty days after date I promise to pay to the order of Eldreds & Balcom four thousand dollars at the Michigan Insurance bank; value received.

(Signed) " F. E. ELDRED "

Endorsed: " Eldreds & Balcom."

Substitution of plaintiff's attorneys.

SEPTEMBER 13, 1864.—This day came the plaintiff, by its attorney, and filed its consent to the substitution of Finches, Lynde & Miller, as the attorneys of the said plaintiff, and on its motion it is ordered by the court that Messrs. Finches, Lynde & Miller be and they are hereby substituted as the attorneys of the said plaintiff, in the place and stead of W. I. Butler.

Said consent to substitution is as follows:

U. S. circuit court, district of Wisconsin.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED ET AL.

I hereby consent to the substitution of Messrs. Finches, Lynde & Miller as attorneys for said plaintiff.

W. I. BUTLER, *Pl'ff's Att'y.*

MILWAUKEE, *Sept.* 12, '64.

SEPTEMBER 15, 1864.—This day came the defendant, Anson Eldred, by his attorneys, Messrs. Cary & Pratt, and filed his plea as follows:

Plea of Anson Eldred.

U. S. circuit court, district of Wisconsin.

ANSON ELDRED, IMPLEADED, &C.,
ads.
MICHIGAN INSURANCE BANK.

And now comes the said defendant, Anson Eldred, by Cary & Pratt, his attorneys, and defends the wrong and injury, when, &c., and says

that said defendants did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them; and of this he puts himself upon the country, &c.

CARY & PRATT,
Att'ys for Def't.

8 JANUARY 3, 1865.—This day came the parties by their counsel, and, by consent, it is ordered by the court that this cause be, and the same hereby is, continued.

APRIL 17, 1865.—This day depositions received from post-office and filed.

APRIL 19, 1865.—Depositions received from post-office and filed.

JULY 12, 1865.—This day came the plaintiff, by its attorneys, and, on their motion, it is ordered by the court that the depositions on file in this cause be, and the same are, published.

And afterwards, to wit, at the April term, A. D. 1866, and on the 19th day thereof, to wit, on the second day of May, A. D. 1866, the following proceedings were had, to wit:

First trial.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED. } At law.

This day came the parties by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: R. W. Ryckman, George Bowman, Israel Stebbins, George W. Clason, F. J. Crosby, J. Fowle, M. C. Cooke, A. J. W. Pierce, Arthur W. Wheelock, John Ruan, Henry T. Thompson, and James Curry, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, and the trial of this cause not being concluded, the further hearing was adjourned until to-morrow morning at nine o'clock.

And afterwards, to wit, on the twentieth day of said term, to wit, on the third day of May, A. D. 1866, the following proceedings were had, to wit:

Trial concluded, and verdict.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED. } At law.

This day, came the parties, by their counsel, and the trial of this cause was resumed. And the jurors of the jury aforesaid being charged by the court, retire to their room, under the charge of a sworn officer, to deliberate on their verdict. And the jurors of the jury aforesaid return into court, and upon their oaths respectively do say that the said defendant did not assume and promise in manner and form as the said plaintiff hath declared against him.

9 And came the plaintiff, by its counsel, and filed its motion to set aside the verdict, and for a new trial, as follows:

Motion for new trial.

Circuit court of the United States, in and for the district of Wisconsin.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED ET AL.

And now comes the said plaintiff, by Finches, Lynde & Miller, and moves the court now here, to set aside the verdict of the jury in this cause, and for a new trial, for the reason that the verdict is contrary to law and against the evidence.

FINCHES, LYNDE & MILLER,
Def'ts Atty's.

And afterwards, to wit, on the 25th day of said term, to wit, on the eleventh day of May, A. D. 1866, the following proceedings were had, to wit:

Motion for new trial overruled, and judgment.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED. } At law.

This day came the parties by their counsel, and the motion for a new trial came on to be heard, and was argued by counsel. Whereupon it is ordered by the court that said motion be, and the same hereby is, denied. Whereupon it is considered and adjudged by this court now here, that the said plaintiff take nothing by its said writ, and that the defendant do have and recover of the said plaintiff the sum of sixty-eight dollars and twenty-six cents, his costs about his said defence in this behalf by him sustained, and that he have execution therefor.

Judgment-roll signed May 11th, A. D. 1866. Costs, $68.26.

A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

Judgment-roll filed May 11, 1866, at 3 o'clock p. m.

A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

And same day, (May 11, 1866,) upon filing the consent of Cary & Pratt, it is ordered by the court that John W. Cary be, and hereby is, substituted as the attorney of record for the defendant in this cause.

Said substitution is as follows:

10 *Substitution of J. W. Cary, att'y for def't.*

Circuit court United States, district of Wisconsin.

ANSON ELDRED, IMPLEADED, &C.,
ads.
THE MICHIGAN INSURANCE BANK.

We hereby consent that John W. Cary be substituted as attorney for the defendent in the above-entitled action.

Dated August 15th, 1865.

CARY & PRATT, *Att'ys.*

DECEMBER 2, 1867.—Bill of exceptions filed by consent, as of May 11th, 1866.

11 DECEMBER 3, 1868.—This day came W'm P. Lynde, H. M. Finch, and B. K. Miller, and filed their bond in the penalty of five hundred dollars, conditioned that the plaintiff shall prosecute a writ of error to effect, and answer all costs, if it shall fail to make good its plea, which bond is approved by the district judge: Whereupon a writ of error and citation issued, and copy of writ of error lodged for defendant in error.

Citation returned.

"I accept service of above citation this fourth day of December, A. D. 1868.

"JOHN W. CARY,
"*Att'y for Def't in Error.*"

DECEMBER 7, 1868.—Certified copy of record forwarded to Supreme Court of the United States.

And afterwards, to wit, at a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday of October, A. D. 1870, and on the second day thereof, to wit, on the fourth day of October, A. D. 1870, the following proceedings were had, to wit:

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI Balcom. } At law.

12 This day came the plaintiff, by its counsel, and presented to the court a mandate from the Supreme Court of the United States, as herein filed, to wit:

Mandate.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Wisconsin, greeting:

Whereas lately in the circuit court of the United States for the district of Wisconsin, before you, or some of you, in a cause between The Michigan Insurance Bank, plaintiff, and Anson Eldred, Elisha Eldred, and Uri Balcom, defendants, wherein the judgment of the said circuit court entered in said cause is in the following words, viz:

"This day came the parties, by their counsel, and the motion for a new trial came on to be heard, and was argued by counsel: Whereupon it is ordered by the court that said motion be, and the same hereby is, denied: Whereupon it is considered and adjudged by this court, now here, that the said plaintiff take nothing by its said writ, and that the defendant do have and recover of the plaintiff the sum of sixty-eight dollars and twenty-six cents, his costs about his said defense in

13 this behalf by him sustained, and that he have execution therefor.
"Judgment-roll signed May 11th, A. D. 1866.

"Costs ..... $68 26"

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and that the said plaintiff recover against the said defendants, Anson Eldred et al., one hundred & two dollars and sixty-seven cents for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is, hereby remanded to the said circuit court, with directions to award a venire facias de novo, 18th April, 1870.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the
14 opinion and judgment of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

Costs of plaintiff: Clerk, $82.67; attorney, 20.00—$102.67.
Taxed by—

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Order on mandate.

Whereupon it is ordered by this court that the plaintiff have execution against the defendant Anson Eldred for the said costs of the Supreme Court, and that a venire facias de novo be, and hereby is, awarded.

And now, at this same term, to wit, July term, A. D. 1871, and on the fourth day thereof, to wit, on the sixth day of July, A. D. 1871, present and presiding the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, and the Honorable Andrew G. Miller, district judge, the following proceedings were had, to wit:

Second trial.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED. } At law.

15 This day came the parties, by their counsel, and the issue herein came on to be tried: Whereupon a jury was called to try

the same, who came, to wit: Francis A. Brackett, Edwin D. Henry, Clinton Matteson, Hiram Edgerton, George Langton, Handford L. Hutchinson, Seth J. Perry, William H. Peters, L. J. Brayton, Charles Olmsted, Joseph Bouron, and Charles A. Trowbridge, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled.

And the jurors of the jury aforesaid being charged by the court on their said oaths, respectively, do say that the defendant Anson Eldred did assume and promise in manner and form as the plaintiff hath herein declared against him, and assess the damages to the said plaintiff at the sum of five thousand five hundred and twelve dollars and forty cents.

And afterwards, to wit, on the sixth day of said term, to wit, on the eighth day of July, A. D. 1871, the following proceedings were had, to wit:

Judgment.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED. } At law.

This day came the plaintiff's counsel, and on his motion it is considered and adjudged by this court now here, that the said plaintiff
16 do have and recover of the said defendant, Anson Eldred, the sum of five thousand five hundred and twelve dollars and forty cents, damages so as aforesaid assessed by the jury, together with one hundred and fifty-eight dollars and seventy-six cents, its costs about its said suit in this behalf by it expended, and that it have execution therefor.

Judgment-roll signed July 8th, A. D. 1871.

EDWARD KURTZ, *Clerk.*

Damages, $5,512.40; costs, 158.76—$5,671.16.
Judgment-roll filed July 8th, A. D. 1871, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

And same day, (July 8, 1871,) bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court of the United States, eastern district of Wisconsin.

MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, IMPLEADED WITH ELISHA Eldred and Uri Balcom.

Afterwards, to wit, at a term of said circuit court begun and held at the city of Oshkosh in said district, on the first Monday of
17 July, in the year of our Lord 1871, to wit, on the 6th day of said July, the issues so as aforesaid joined came on to be tried, H. M. Finch, esquire, appearing as counsel for the plaintiff, and John W. Cary as counsel for the defendant, Anson Eldred. And a jury was duly em-

pannelled, tried, and sworn, of twelve lawful men, as follows, to wit, Francis A. Brackett, Edwin D. Henry, Clinton Matteson, Hiram Edgerton, George Langton, Hanford L. Hutchinson, Seth A. Perry, William H. Peters, L. J. Brayton, Charles Olmsted, Joseph Bowson, and Charles A. Trowbridge, and the said plaintiff's counsel, to maintain said issues on its part, offered to read in evidence the promissory note described in the declaration. To the reading of which in evidence the defendant's counsel then and there objected for the reason that it appeared from the face of said note that the date thereof had been changed from August to June, and on inspection of the date of said note it appeared that the date of said note had first been written "Aug't" and partially obliterated and the word "June" written over it.

The court overruled said objection, and the defendant's counsel then and there excepted; the plaintiff's counsel read said note to the jury as follows, to wit:

"$4,000. DETROIT, *June 12th*, 1861.

"Sixty days after date I promise to pay to the order of Eldreds
18 & Balcom, four thousand dollars at the Michigan Insurance Bank, value received.

"F. E. ELDRED."

(Endorsed:) "No. 50. Eldreds & Balcom."

Said note had written on its face: "Protested for non-payment August 14th, 1861.

"H. P. SANGER,
"*Notary Public, Wayne Co., Mich.*"

The plaintiff's counsel offered to read in evidence the certificate of protest attached to said note, to which defendant's counsel objected.

The court overruled said objection, and defendant's counsel then and there excepted, and said certificate of protest was read as follows, to wit:

"STATE OF MICHIGAN,
"*County of Wayne, ss:*

"Be it known that on the 14th day of August, in the year of our Lord one thousand eight hundred and sixty-one, at the request of H. K. Sanger, cashier, I, Henry P. Sanger, notary public, duly admitted and sworn, dwelling in the city of Detroit, county and State aforesaid, did present the original, a true copy of which is attached, at the Michigan Insurance Bank, in the city of Detroit, and demanded payment thereof which was refused.

19 "Whereupon, I, said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker and endorser of the said note as against all others whom it doth or may concern, for exchange or re-exchange, and all costs, charges, damages, and interest already incurred by reason of the non-payment of said note; and I, the said notary, do hereby certify that on the same day and year aforesaid due notices that said note had thus been presented for payment, and that payment thereof had been thus demanded and refused, and that the holders of the said note did and would look to the drawers, makers, and endorsers thereof for payment of the same, *notices* were put into the post-office of Detroit, with the full legal postage paid thereon, and directed as follows, after dili-

gent enquiry being made for the residence of the drawers & endorsers, and not being able to ascertain it.

"Notice for Eldreds and Balcom, directed, Chicago, Ill's; and I further certify that like notices were left as follows:

"Notice left for at
" "
" "
" "

"Each of the above-named places being the reputed place of residence of the person to whom the notice was directed, or for whom it was left as aforesaid.

20 "In witness whereof I have hereunto subscribed my name and affixed my seal of office.

[SEAL.] "HENRY P. SANGER,
"*Notary Public, Wayne County, Mich.*"

The plaintiff's counsel then read in evidence the deposition of Henry P. Sanger as follows, to wit:

I reside in Detroit, and have so resided since 1850. In 1861 I was a notary public for Wayne County, Michigan, qualified and acting as such.

(Witness being now shown a note attached to the deposition of Francis E. Eldred, and marked Exhibit B, saith:)

I have seen this paper before, on 14th August, 1861, at which time I presented it to the Michigan Insurance Company Bank, at the request of Henry R. Sanger, then cashier of said bank, and demanded payment, and payment was by said bank refused. I protested it on the same day, and the certificate of protest attached to Exhibit B was made and attached to said note at the same time. I put a notice of protest in the post-office at Detroit on the same day, post-paid, and addressed to Eldreds and Balcom at Chicago, Illinois; using a printed form of notice, of which form I now attach a copy marked Exhibit G. The notice was dated August 14th, 1861, and was addressed to "Eldreds & Bal-
21 com." It contained a description of said note, the amount for which it was made, the name of the maker, the name of the endorser, the date thereof, the time when payable, the place where payable, and that the demand had been made on that day, for payment thereof, to the Michigan Insurance Bank, and that payment had been refused, and that the same was signed by me as a notary public. My notarial fees were 75 cents, and the postage thereon was 3 cents.

On cross-examination:

I was paying teller of the bank on the day referred to. As notary I presented the note to the book-keeper of the bank and asked him if there were any funds to the credit of F. E. Eldred. He said there was not. I then took it to the cashier of the bank. He instructed me to protest it, and said Eldreds and Balcom lived in Chicago. I asked him to pay it, and he refused so to do. I kept at the time a copy of this note and a copy of the notice sent. The certificate of protest was filled up on the same day that the endorsement on the face of the note was made, and it was attached to the note on the same day. I cannot say whether the certificate of protest has remained attached to
22 the note ever since, because I handed it to the bank on the next day. I cannot say that the certificate of protest produced and attached to Exhibit B is the same certificate which was attached to the note on that day. I have not been called upon to make out any other

certificate to the same effect. It is the custom to minute the fees of the notary on the certificates of protest. The note was in my hands as paying teller of the bank, and it was part of my duty to see that any paper left in my hands as paying teller, whether of a customer of the bank, or belonging to the bank itself, was either paid or was duly protested for non-payment. The note came into my hands on the morning of the 14th day of August, 1861.

On re-direct examination:

I have no doubt whatever that the protest attached to Exhibit B is the original certificate of protest made out by me at the time. I have never been called upon to make out any other.

H. P. SANGER.

Sworn and subscribed before me this 10th day of April, 1865, at Detroit, Michigan.

W'M D. WILKINS,
U. S. Comm'r.

(Attached to the deposition was a copy of the note and certificate of protest given above.)

"G."

DETROIT MICH., 186'.

23 M , take notice that the for $, made by , dated payable after date at , and endorsed by you, has this day been presented and demand made for thereof, which has been refused; said has been duly protested for non , and the holders now look to you for payment of the same.

Yours, &c.,

Notary Public, Detroit, Michigan.

Exhibit G marked by me.

W'M D. WILKINS, *U. S. Com.*

The plaintiff's counsel then called, as a witness, Elisha Eldred, who was duly sworn, and testified that he was a member of the firm of Eldreds and Balcom. They received notice of protest of this note. I have looked for it, and cannot find it.

The plaintiff then rested its case.

The defendant's counsel then exhibited the note in suit to the jury and called attention to the alteration of date.

The witness Elisha Eldred was recalled by defendant, and six notes signed by Francis E. Eldred, and endorsed by Eldreds and Balcom, were shown him by defendant's counsel, and he testified that they were
24 signed by Francis E. Eldred, and were endorsed by him in the name of Eldreds and Balcom. He also testified that the notes that he endorsed in blank for F. E. Eldred were in a bound book; that he endorsed different books of notes; that when one book full was used up, he endorsed another, but could not tell whether notes he endorsed were numbered or not, and could not tell whether the six notes shown him by defendant's counsel were in same book as note in suit or not.

Defendant's counsel then offered said notes in evidence, and particularly one bearing date June 30th, 1861, and numbered 47, as tending

to show that the note in question was not filled up and put in circulation until after June 30th, 1861; to the introduction of which in evidence the plaintiff's counsel objected. The court sustained the objection, and defendant's counsel then and there excepted.

The defendant's counsel then produced the original articles of copartnership of Eldreds and Balcom, to which the witness testified, and defendant's counsel then offered to read therefrom so much as fixed
25 the duration of the partnership, and showing that it was to expire by its own terms on the 30th day of June, 1861; to the introduction of which in evidence the plaintiff's counsel objected; court sustained the objection, and defendant's counsel then and there excepted.

The witness further testified that John Owen was president of the plaintiff, and had been for many years prior to 1861; that witness was now in partnership with him, and had been since May last; that he had known him from this childhood. He sold Owen four vessels of Eldreds and Balcom in 1861, in March. Could not tell when John Owen first knew of dissolution of Eldreds and Balcom. Have been clerking for John Owen since the spring of 1862, until last May; since then has been partner. He talked with Owen in the spring of 1861. Don't recollect that he told him he was fearful their vessels would be attached if they went on lower lakes. He consulted with John Owen. Don't recollect of telling him about company's affairs particularly. Don't think he was in Detroit until October. The defendant Anson commenced
26 a suit against John Owen to recover the vessels witness sold him. Eldreds and Balcom made an assignment July 1st, 1861. Our partnership by its terms expired June 30th, 1861, and we closed business at that time. Don't know as plaintiff knew of our dissolution. Was acquainted with the Detroit Tribune; did not know that plaintiff took that paper. Does not know that he corresponded with Owen in June or July, 1861. Owen got the vessels in 1861. Witness furnished money to the captains; they were bringing lumber to Eldreds and Balcom.

The defendant then read in evidence the following depositions, to wit:

27 Francis E. Eldred, being of lawful age, and having been by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, did depose and say as follows:

I reside in Detroit, Michigan. In 1861 I knew the firm of Eldred & Balcom, doing business in Chicago and Milwaukee, and composed of Elisha Eldred, Anson Eldred, and Uri Balcom. The note produced and attached to my deposition, and marked Exhibit B, bears my signature. The endorsement on the back of said note of "Eldred & Balcom" is in the handwriting of Elisha Eldred. The body of the note is in my handwriting. The word "June" was written by me, and was written before I used the note. I transferred that note to the Michigan Insurance Bank, I should judge, at the time of its date. It was transferred at about that time. I made arrangements to borrow money of the bank, and transferred the note as security for money which the bank proposed to lend me. I borrowed money of the bank, for which they held that note as security. I had an arrangement with the firm of Eldreds and Balcom, by which they endorsed my notes and I endorsed theirs; and the endorsements were made in blank, and were filled up by the holders as they wished to use them. This note was endorsed in that way, and this arrangement was known to Anson Eldred as well as to the other partners. The said bank loaned to me on July 26, 1861, eight hundred and fifty dollars; on July 31st, 1861, one thousand dol-

lars; on August 11, 1861, eight hundred and fifty dollars; on August 25th, 1861, seven hundred dollars, for which I gave four notes, the originals of which are now shown to me by the plaintiff, and identified by me, and copies thereof are hereunto annexed, and marked respectively Exhibits C, D, E, and F. I received the amount of said notes respectively from the bank on the times they bear date, and it was to secure the payment of these monies that I let the bank have the note marked Exhibit B, and the bank actually held the note marked B at the time they let me have the monies above stated. On the last four notes something has been paid; they are not all paid, and I do not know what amount has been paid.

Cross-examination:

Exhibit B was endorsed in blank by Elisha Eldred, as above stated, and was delivered to me before it was executed. The printed
28 form of the note was not filled up when the endorsement was made. I had a number of such notes, and cannot now account why the word "August" in Exhibit B was rubbed out and June written over it. I wrote the body of the note. I was in the habit of sending to Eldreds & Balcom, by express, packages of notes signed by me, but not filled out, for their endorsement. I don't recollect anything about the fact of rubbing out "August" or writing "June" now, but know the word "June" is in my handwriting, and my knowledge of the fact that I wrote it is derived from an inspection of the note now, and not from any recollection of the circumstances. The four last notes were given from time to time as I wanted money to buy bark.

I gave the bank a chattel-mortgage on the bark as additional security for the money advanced on the four notes as above stated; cannot state the date of that mortgage.

Exhibit B represents the same debts which *is* due on the other four notes. The sums expressed in notes C, D, E, and F were advanced at the times said notes bear date.

Exhibit B was delivered to the bank at or about the time it bears date. It was delivered before the other four notes.

There was no indebtedness existing between myself and the bank at the time of the delivery of the note marked B, and no money was advanced to me at the time of its delivery, but I drew the money on the other four notes as I happened to want it. This $4,000 note, marked B, was not discounted in the due course of business.

I frequently had paper discounted for me by the bank at 60 and 90 days. The payments made on the four notes were made by checks of Jewell & Sons on Hartford Bank in my favor, to pay for shipments of leather made by me to them, and said check by me deposited in the bank. I did have the entries of such payments in a book kept by me, but such book has been lost in moving the papers in my office. This was a book of shipments of leather by me to Jewell & Sons, and at the foot of each page was entered the amounts paid to the bank. I kept a cash-book in my business, but not at this time. The only book kept in reference to my transactions with the bank was the book above referred to, and these entries were made with reference to my transactions with Jewell & Sons.

There was no stipulated sum to be paid weekly, but I was to pay in, from week to week, as I shipped the leather, such sums as remained after paying help. The shipments were mostly made by the Great Western Railway in winter, and by J. S. Hurd & Company' propellers in summer.

None of the debts due the bank had fallen due at the time when Exhibit B matured. I do not think I was at all indebted to the bank at the time I gave them the chattel-mortgage.

The chattel-mortgage had no reference to past indebtedness, but wholly to future indebtedness; it had reference to any subsequent indebtedness which I might subsequently owe the bank. I cannot approximate to the amount due on the four notes C, D, E, and F; prolonged and severe illness since these transactions, and a near approach to death, has prevented my keeping such details in my
29 memory. The money obtained on the four notes was used entirely in the purchase of bark to fill the contract with P. Jewell & Sons I was indebted to Jewell & Sons; part of the money went to pay their debt regularly, and after a certain time part was to be paid regularly to the bank; these payments were to be made out of the proceeds of my tannery; Jewell & Sons furnished me with hides. I borrowed the money from the bank to get the bark to tan them with, and shipped the leather to Jewell & Sons, at Hartford, Connecticut, and they sent me a check on receipt of each bill of lading; and I used the checks as heretofore described.

At time of adjournment, being Monday, April 10, 1865, at 2 o'clock p. m., witness now desires to make the following statement as part of his evidence, to wit:

The four notes, C, D, E, and F, were originally for one thousand dollars each, and were endorsed by Eldreds & Balcom; as they came due I reduced them to the present amounts, and gave these as renewals of former notes. These notes were given in place of the original notes, which were endorsed by Eldreds & Balcom, and which were given before I transferred to the bank the note marked Exhibit B. When I made arrangements to get a further discount to purchase bark, I gave the bank this note B and a chattel-mortgage, to secure them for money which they agreed to advance thereafter to purchase bark, as well as to secure previously existing indebtedness.

Cross-examination resumed:

The chattel-mortgage covered bark which I had in my yard, bark enough to finish turning out the contract with Jewell & Sons. I cannot state the value of the bark. I had purchased considerable with my own means, besides that which I purchased with the advance I had received from the bank. In addition, as collateral security, I assigned to the bank the contract I had with Jewell & Sons. This was a contract by which they were to furnish hides, and I was to tan them at 6½ cents per pound. The $4,000 note, Exhibit B, and the chattel-mortgage, were delivered to the bank at about the same time. I think there was no doubt expressed as to the solvency of Eldred & Balcom. I was aware that the firm of Eldreds & Balcom dissolved in the summer of 1861, but cannot state on what day. I was aware that the firm of Eldreds & Balcom had failed at about the time they did fail. I was not aware that the firm of Eldreds & Balcom had failed at the time that I made the arrangement with the bank for the money, as above stated. The letter now shown to me, and marked Exhibit H, appears to be in my handwriting. The money value of my business with Jewell & Sons would probably average at the rate of $2 a hide. I would necessarily have to handle about twenty or twenty-five thousand dollars a year connected with that business. I did not, at this time, keep a full set of books, nor did I then keep a regular book-keeper, whose business it was to attend to the books and nothing else. I did not keep a debit and

credit account with the Michigan Insurance Bank, but only in my bank-book; was doing business with no other bank at the time.
30 I cannot tell whether in June, July, or August, 1861, I kept a regular bill-book or not, but I think I did of all of the notes of which these particular notes are originals. This was the only transaction in which I left Eldreds & Balcom's endorsement as collateral for my own paper. In every other case I left my own paper, endorsed by them, and obtained the money on it at the time of delivering it. I have no recollection of any of the officers of the bank, at the time of the delivery of Exhibit B, stating that Eldreds & Balcom were hopelessly insolvent, and that they did not look on their endorsement as any security. An attachment suit was brought by the bank upon the note marked Exhibit B, but I cannot recall the date of the suit.

Ques. by def'ts' att'y. Was not this note, marked B, prepared for the express purpose of using it as the foundation of an attachment suit against the tannery property in Detroit, then standing in the name of Anson or Elisha Eldred, or to head of' other creditors from getting a prior lien?

Ans. I have no recollection of anything of the kind.

Ques. by same. Can you swear that such was not the purpose for which said note was prepared, executed, and delivered?

Ans. I have no recollection of anything of the kind.

Ques. by the same. Was Mr. E. Wilcox, the attorney of the bank, who brought the attachment suit for the bank on Exhibit B, at the same time your attorney in your joint business?

Answer. He has been my attorney in what little I have had to do. I can't say whether he was the regular attorney of the bank at the time or not.

On redirect examination:

On reflection, these notes were renewals of other notes in the same amounts, endorsed by Eldreds & Balcom, and those had been preceded by still other notes in $1,000 each, also endorsed by Eldreds & Balcom, on three of which payments had been made, reducing them to the amounts for which the notes now produced stand. I also obtained from the bank, during that season, other monies besides these. At the time I gave the bank Exhibit B, I owed to them no indebtedness other than that which was endorsed by Eldreds & Balcom*b*. Exhibit B was intended, also, to stand as security for the debt which I owed on the four notes, as well as for any future indebtedness which I might contract.

On recross-examination:

Ques. by def'ts' att'y. Did not Mr. Elisha Eldred go with you to the bank, on July 19, 1861, for the purpose of assisting you to induce the bank to advance you the $4,000 of which you have testified?

Answer. I can't say. He was here at the time I made the arrangement, and it is my impression that it was before their failure.

On redirect examination:

I made the arrangement to get the additional money to buy bark with Mr. Sanger, and gave the $4,000 note (Exhibit B) to Mr. Sanger,
31 and the indebtedness for the money to buy bark was an entirely additional indebtedness to that represented by the notes marked C, D, E, and F

F. E. ELDREDS.

Sworn and subscribed before me, at Detroit, Mich., April 10, 1865.
W'M D. WILKINS,
U. S. Com.

Exhibit D.—Marked by me, W'm D. Wilkins, U. S. com.

Know all men, by these presents, that we, Francis E. Eldred, and Mercy A., his wife, of Detroit, of the first part, being justly indebted unto Eben N. Wilcox, of the same place, of the second part, divers sums which he has become liable to by reason of his endorsement of certain notes, bills, and other obligations for the said F. E., and in consideration of one dollar to us paid, have, for the purpose of securing the payment of said debt and the interest thereof, granted, sold, and mortgaged, and, by these presents, do grant, bargain, sell, and mortgage unto the said Eben N. Wilcox, the following goods, chattels, and personal property, to wit:

All and singular the live stock, crops, farm, implements, vehicles, harness, furniture, chattels, and property mentioned and referred to in the schedule hereto annexed, marked Schedule A, situate on the farm of said F. E., in Oakland County, or elsewhere, which said above-described property, at the date of these presents, is free and clear of all liens, conveyances, incumbrances, and levies, and for a valuable consideration we hereby warrant the above representations to be true.

To have and to hold the same forever, provided always, and the condition of these presents is such, that if the said F. E. Eldred shall pay or cause to be paid, at maturity, those certain notes or bills hereinafter mentioned and described, made by the said Francis E., and endorsed by the said Eben N. Wilcox, that is to say, one for the sum of $1,000, due at the Laporte Bank, July 17th, 1861; one for $500, due to W'm Stead, July 24th, 1861; one for $650, due to Moss Brothers, Oct. 9th, 1861; one to Detroit Savings Bank for $500, due Nov. 8th, 1861; one to Parsons & Fisher for $500, due Sept'r 8th, 1861; one to A. H. Day for $400, due Sep'r 8th, 1861; one to Parsons & Fisher for $696.49, due Oct. 11th, 1861, also endorsed by Warren Newbury; and any and all other notes, bills, or other obligations whatsoever of the said F. E. Eldred, the party of the first part, on which the party of the second part is now, or may become liable, and any and all notes, bills, or obligations whatsoever which may be, at any time, given for the renewal or extension in whole or in part of any of the said above-enumerated or non-enumerated notes, bills, or other liabilities whatsoever, and shall pay and indemnify and save harmless the said E. N. Wilcox of, from, and against all and singular all costs, charges, damages, expenses, attorney and other fees, which he may sustain
32 or incur by reason of the non-payment of any of the said notes, bills, or other obligations above-mentioned or referred to, (it being the intention hereof that this conveyance shall stand as a continuing subsisting lien and security for the benefit of said Wilcox until all his liability as endorser, or guarrentor, or otherwise, for said Francis E. shall be extinguished,) and upon the full payment and extinguishment thereof, then this instrument shall be void and of no effect. And I, the said Francis E., hereby agree to pay the same accordingly. But, if default be made in such payment, the said E. N. Wilcox, his agent or attorney, is hereby authorized to sell at public auction, after the like notice, as is required by law for constables' sales, the goods, chattels, and personal property hereinbefore mentioned, or so much thereof as

may be necessary to satisfy the said debt, interest, and reasonable expenses, and to retain the same out of the proceeds of such sale; the overplus or residue, if any, to belong and be returned to the said Francis E., or assigns; and the said Eben N., his attorney or agent, is hereby authorized at any time, when he shall deem the above security insecure, to take possession of said goods, chattels, and personal property, and the same retain in some convenient place, at the risk and expense of the said Francis E., until the said sums of money shall become due as aforesaid, and then to dispose of the same in the manner above specified.

In witness whereof the said parties of the first part have hereunto set their hands and seals the first day of July, in the year of our Lord one thousand eight hundred and sixty-one.

(Signed) F. E. ELDRED. [L. S.]
(") MERCY A. ELDRED. [L. S.]

Signed, sealed, and delivered in presence of—

Schedule A.—Referred to in the foregoing instrument.—(Signed) F. E. Eldred.

(Here follows a description of a large amount of property.)

33 *Exhibit F.—Marked by me, W. D. Wilkins, U. S. com.*

This indenture made this first day of October. A. D. 1860, between Pliny Jewell, Pliny Jewell, jr., and Marshall Jewell, copartners as P. Jewell & Sons, at Hartford, Connecticut; Francis E. Eldred, of Detroit, Michigan, witnesseth:

First. The said P. Jewell & Sons, in consideration of the promises of the said Francis E., hereinafter, and for divers other valuable
34 considerations from him to them moving, do hereby covenant and agree to furnish to the said Francis E., at his tannery, in said Detroit, twenty thousand hide', within two years from the date hereof, the said hides to be tanned by the said Eldred, and by him shipped after tanning to the said Jewell & Sons, as hereinafter agreed; and the said Jewell & Sons do, for like considerations, further covenant and agree to pay the said Eldred for tanning the said hides the sum of 6 and one-half (6½) cents per pound on the weight of the leather, in manner following, to wit: Five cents (5) cash upon the receipt by them at said Hartford of the bill of lading of any given quantity shipped, upon the weight of said quantity; and one and one-half (1½) cents per pound to be applied at said time upon a certain promissory note of even date, for the sum of eighteen thousand dollars, ($18,000,) executed by said Eldred to said Jewell & Sons, and endorsed by Elisha Eldred and Anson Eldred, to go to the extinguishment, first, of the accruing interest upon said note, which draws ten (10) per cent., payable semi-annually, and then of the principal thereof.

Second. The said Francis E. Eldred, in consideration of the premises and of other valuable considerations, doth hereby covenant and agree well and properly to tan all such hides as he shall receive under the foregoing agreement from the said P. Pewell & Sons, with all due despatch, and to ship the leather when tanned to the said P. Jewell & Sons, at said Hartford, all freight upon said leather to be paid by said Jewell & Sons, and to receive as full compensation the aforesaid sum of six and a half (6½) cents, payable as aforesaid.

Third. It is hereby expressly understood and agreed by and between the said parties hereto, that the expense of all cartage and drayage of said hides, in the said city of Detroit, to the said tannery, and of said leather from said tannery to the place or places of shipment, is to be borne by the said Eldred, and that he is to receive as an equivalent therefor all the refuse and offal of said hides.

Fourth. It *it* is further understood and agreed that all previous contracts and agreements concerning similar matters are annulled and of no effect hereafter, that is, between said parties.

In witness whereof we have hereunto set our hands this first day of October, A. D. 1860.

In duplicate.

P. JEWELL & SONS.
FRANCIS E. ELDRED.

Attest:
ALFRED RUSSELL.

Exhibit C.—Marked by me, W'm D. Wilkins, com'r.

Whereas I, Francis E. Eldred, of the city of Detroit, in the State of Michigan, am justly indebted to the Michigan Insurance Bank in the sum of three thousand four hundred dollars upon notes, part of which are now past due and unpaid, and the remainder are about to mature; and whereas the said bank, in consideration of the security hereinafter mentioned, have agreed with me, the said Eldred, to advance to me a sum of money not to exceed four thousand dollars, in payment of five hundred dollars each, from time to time, between this and the first of November next, in order in part to enable me to purchase the tan-bark necessary for my business, and thereafter mentioned; and whereas, for the purpose of securing to said bank the payment of such advances, and the interest thereon, and also the entire amount of the indebtedness first above mentioned, and the interest thereon, I have agreed with the said bank to execute all such instruments as may now or hereafter be or become necessary or proper for the purpose of fully and effectually securing to said bank a perfect and unquestionable lien on all of the tan-bark in and about my tannery, on Woodbridge street, in the city of Detroit aforesaid, now in use or then for use; and also upon all such bark as may at any time hereafter, prior to the payment of such indebtedness in full, be purchased by me for use in and about said tannery and the business connected therewith, no matter from what source the means for the purchase of said bark may be derived.

Now, therefore, for the purpose of carrying out as far as may be practicable the above agreements on my part, I have granted, bargained, sold, and mortgaged, and by these presents do grant, bargain, sell, and mortgage, unto said Michigan Insurance Bank, the following goods, chattels, and personal property, to wit: all of the tan-bark in and about the tannery above mentioned, and all such as may be hereafter purchased by me as aforesaid, which said above-described property, at the date of these presents, is free and clear of all liens, conveyances, incumbrances, and levies; and I agree with said bank, that all the bark necessary for my business, which shall hereafter be purchased by me, shall be likewise free and clear of all liens. To have and to hold the same forever: provided always, and the condition of these presents is such, that if I, the said Eldred, shall pay or cause to be paid to the said bank the entire amount of advances made to me, as also my entire indebtedness above

mentioned, in weekly installments of two hundred dollars each, commencing on the seventh day of November, A. D. 1861, and thereafter on the corresponding day in each week, then this instrument shall be void and of no effect, and I, the said Eldred, agree to pay the same accordingly; but if default be made in such payment, the said bank is hereby authorized to sell at public auction, after the like notice as is required by law for constable sales, the goods, chattels, and personal property hereinbefore mentioned, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, and so retain the same out of the proceeds of such sale, the overplus or residue, if any, to belong and be returned to me, said Eldred.

And the said bank is hereby authorized, at any time when it shall deem itself insecure, to enter upon the premises where said bark may be, and to take possession of said goods, chattles, and personal property, and the same retain in some convenient place at the risk and expense of myself, until the said sum of money shall become due as aforesaid, and then to dispose of the same in the manner above specified; and I
36 also agree with said bank that at any time hereafter, upon demand made, I will execute and deliver any other instruments required by said bank for the purpose of fully and effectually securing a lien for such entire indebtedness upon any such bark as may hereafter be purchased by me or my agents.

In witness whereof I, the said Francis E. Eldred, have hereunto set my hand and seal the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and sixty-one.

(Signed) FRANCIS E. ELDRED. [L. S.]

Signed, sealed, and delivered in presence of—
(Signed) H. R. SANGER.

Exhibit E.—Marked by me, W'm D. Wilkins, U. S. com.

$850.00. No. DETROIT, *August* 11, 1861.

Three months after date I promise to pay to the order of H. K. Sanger, cash'r, eight hundred and fifty dollars, at the Albany City Bank, Albany, N. Y. Value received. Due .

F. E. ELDRED.

Exhibit F.—Marked by me, W'm D. Wilkins, U. S. com.

$700. DETROIT, *Aug't 25th*, 1861.

Three months after date I promise to pay to the order of H. K. Sanger, cash'r, seven hundred dollars, at the Albany City Bank, Albany, N. Y. Value received. Due .

No.

F. E. ELDRED.

Exhibit C.—Marked by me, W'm D. Wilkins, U. S. com.

$850.00. DETROIT, *July 26th*, 1861.

Three months after date I promise to pay to the order of H. K. Sanger, cashier, eight hundred and fifty dollars, at the Albany City Bank, Albany, N. Y. Value received. Due .

No.

F. E. ELDRED.

Exhibit D.—Marked by me, W'm Wilkins, U. S. com.

No. $1,000.00 DETROIT, *July* 31, 1861.

Three months after date I promise to pay to the order of H. K. Sanger, cashier, one thousand dollars, at the Albany City Bank, Albany, N. Y. Value received. Due .

F. E. ELDRED.

37 *Exhibit E.—Marked by me, W'm D. Wilkins, U. S. com.*

CITY CLERK'S OFFICE.

STATE OF MICHIGAN, COUNTY OF WAYNE,
City of Detroit:

I, Francis Ramstaller, clerk of the city of Detroit, do hereby certify that I have carefully and diligently examined the records of chattel mortgages in my office, and can only find three chattel mortgages now on file in said office, and in full force against Francis E. Eldred, from the year 1856 to the date of this certificate, viz, one given by said F. E. Eldred to E. N. Wilcox, filed Aug. 13, 1861; another given by said Eldred to said Wilcox, filed Sept'r 3rd, 1861; and also, another given by said Eldred to the Michigan Insurance Bank, filed July 25th, 1861.

In witness whereof I have hereunto set my hand and affixed the corporate seal of the city of Detroit this 12th day of April, A. D. 1865.

[SEAL.] FRANCIS RAMSTALLER,
City Clerk,
By JOHN M. DALRYMPLE,
Deputy Clerk.

[Stamp.]

Exhibit H.—Marked by me, W'm D. Wilkins, U. S. com.

F. E. ELDRED, *Tanner, No.* 1 *Michigan Ave.*

DETROIT, MICH., *July* 16*th*, 1861.

D'R BROTHER: I am in receipt of letter from Elisha. He says E. and B. have given up the ship for good, and I cannot but infer from his letter but what the going to protest of 3,500 dolls. in Boston and $1,000 he got discounted for me at Mutual Loan and Trust Co., Chicago, was the cause of it. He does very wrong to secure me in that way. Had he reported that to me, saying you could go on if that was paid, I would have had an auction and sold everything down to the last shirt to have paid it. I had a good credit, until he sent it broadcast to the world that I was on your paper $110,000.00, by making an assignment. Since then it has all been down-hill work. I have not had any ambition to do anything since. Write me and let me know what you have done. I feel anxious to hear. I learn through the papers that you have sold out. How is your mortgage against E. and B., and on the Mills & C.?

Yours, brother,

FRANCIS E.

P. S.—All well, except Julius; he is still confined to the house, and the Lord only knows when he will get out. Last night he did not sleep one minute.

WALTER INGERSOLL, being of lawful age, and having been by me first carefully examined and cautioned, and duly sworn to testify the truth,

the whole truth, and nothing but the truth, in the matter of controversary aforesaid, did thereupon depose, testify, and say as follows, to wit:

I reside in Detroit; am cashier of the Michigan Insurance Bank. I was assistant cashier of said bank in the year 1861. Henry K.
38 Sanger was then cashier of said bank, and continued as such cashier up to September 1, 1863. He is now deceased. I continued as assistant cashier until Sept. 26, 1863, when I became cashier. I know Francis E. Eldred; have known him 25 years and upwards. The Michigan Insurance Bank hold the four notes, of which Exhibit C, D, E, and F are copies, as liabilities against F. E. Eldred. They are now in our "bills discounted," and among the assets of the bank.

The note marked Exhibit B, I believe, is held by the bank as a collateral security for the payment of the notes C, D, E, and F. It was not rec'd by me, but by Mr. Sanger; but that is the way I understand it. Mr. F. E. Eldred has not, that I am aware, paid any part of the indebtedness secured by these four notes. It does not appear in the bank that he has. There are monies in the bank to the credit of Mr. Eldred which might be applied to the payment of the indebtedness secured by these notes, to wit, $127.05, with interest from the 27 October, 1862, on $405 thereof, and from November 22, 1862, on $123 thereof, against which we have a balance of $10, and interest thereon from October 1st, 1861. The whole amount of principal and interest on the notes C, D, E, and F is due, less the credits above stated.

On cross-examination:

Ques. by def't' att'y. You say that you believe note marked Exhibit B to be held as collateral security by the bank for the indebtedness of Francis E. Eldred to the bank. Have you any personal knowledge whatever on that subject?

Answer. I did not see the note delivered nor hear the conversation between Mr. Sawyer and the person who delivered it.

Ques. by same. From what source is your belief on the subject derived?

Answer. From conversations with Mr. Sanger, their cashier, and with Mr. Owen, then and now president of the bank, and from hearing Mr. Eldred's testimony; and said note having been returned to us from our attorneys in Milwaukee (who have in charge and are attempting to collect it) for inspection.

Ques. by same. Is there any entry or memorandum upon any book kept by the bank, showing the date of the reception of Exhibit B by the bank, or exhibiting the purpose and object of its reception, as collateral or otherwise?

Answer. I have never seen such a record.

Ques. by same. Ought there to be such a record, according to the due and usual course of business of the bank?

Answer. I do not think it necessary, nor do I believe it customary.

Ques. by same. You say that you have never seen any such record. Does any such record, to your knowledge or in your belief, exist?

Answer. I think it very likely that Mr. Sanger's letter endorsing this note to our att'y at Milwaukee, that the whole thing is set forth, although I have never seen such letter.

Ques. by same. To what attorney do you refer?

39 Answer. To W. J. Butler, I think, but am not sure those are his initials.

Ques. by same. At whose request was the note sent to W. J. Butler?

Answer. I cannot state, nor do I know.

Ques. by same. Do I understand you to say that where a note of the size of $4,000 is received by the bank for any purpose, it is not customary or usual to make in some place a written entry of the fact upon some of the books kept by the bank for that purpose?

Answer. When we receive discount paper not bearing indorsements but persons wishing to leave therewith other notes, bonds, or stocks, it is customary to make a note of them or a memorandum on our bill-book, showing the security held for the payment of such note. Where we receive collateral security to already existing indebtedness, or indebtedness that may be incurred, I do not think it necessary to make an entry of it on our books, because it is to apply as security for general indebtedness and not special.

Ques. by same. Although it may be necessary to make such an entry, is it not the usual practice to do so?

Answer. I don't think it is. Sometimes cashiers who are very methodical in their business have a memorandum-book, a mere tickler, for their own personal inspection and accommodation so that they not lose the run of this kind of business. But this is not one of the books of the bank, but a book kept for the cashier's own accommodation.

Ques. by same. Have you any means of determining, or do you know, on what day and year the note marked Exhibit B was delivered to the bank?

Answer. I have no means of determining, and I do not know.

Ques. by same. Can you state whether there is in the possession of the bank, or of any of its officers, the means of determining such date of reception?

Answer. I am not aware of any such information on record.

Ques. by same. On the 14th day of August, 1861, was there any other indebtedness from the defendants to the plaintiffs, except that alleged to exist on the four notes C, D, E, and F.

Answer. I am not aware of any other claim that the bank had against the defendants at that time. There were some other notes of Eldreds and Balcom, I believe, given for purchase of vessels, of the bank. I speak from recollection entirely, as it was something not in my department, and with which I had nothing to do; therefore I cannot speak positively.

Ques. by same. Was there on August 14, 1861, any indebtedness of F. E. Eldred to the bank, upon which the banks claimed the defendants to be liable, except the four notes above mentioned.

Answer. I am not aware that there was any. I had nothing to do with discounted paper, and I do not wish to swear positively as to things that I know nothing about.

Ques. by same. Does anything appear upon the books of the bank to show any liability of Eldreds and Balcom at said date upon any paper of F. E. Eldred, or of themselves?

40 Answer. I am not aware of any indebtedness of Eldreds and Balcom other than this note of $4,000, marked Exhibit B. I have since examined the books, and I find no indebtedness of Eldreds and Balcom, as existing on the 14th day of August, 1861, except as endorsers of F. E. Eldred's note for $700, due Aug't 25th, 1861, and that note was paid on the 13th day of September, 1861.

Ques. by same. Did the bank pay money to F. E. Eldred on these four notes to buy bark with?

Answer. No, sir; I don't understand that they did. They might, but I cannot state whether the money was given to him for any special purpose or not.

Qu. by same. Were these four notes secured by a chattel mortgage given by F. E. Eldred, or by the assignment of the P. Jewells & Sons' contract?

Ans. I am unable to give you any of the particulars respecting the chattel mortgage given to the bank by F. E. Eldred. In regard to the Jewell contract, I have to say that it appears that we discounted seven $500 notes for F. E. Eldred. One appears in his account to his credit, on July 31st, 1861; another August 5th, 1861; another Aug't 13th, 1861; another August 17, 1861; another September 5, 1861; another Sep'r 24, 1861; and another October 7, 1861. These notes were paid (as I believe and as shown by the books) by amounts received of P. Jewell & Son on their contract.

Qu. by same. Out of what moneys did the $117.05, spoken of in your direct exam'n, come?

Answer. $4.05 was the balance of a credit to special deposits for account of F. E. Eldred; $123.00 was for 20½ cords of bark, at $5 a cord, as shown by the books of the bank. The special acc't refer'ed to is headed "special deposits," and any deposits made with the bank to apply on indebtedness not due, or past due, are placed with this account and are applied in the final payment. A copy of the "special deposits" so far as related to F. E. Eldred, is now produced and attached to this my deposition, and marked Exhibit I.

Qu. by same. When F. E. Eldred gave the four notes, were these notes renewals of previous notes?

Answer. It appears that they were renewals, (from the book of the bank which I now hold,) that they were renewed once. I judge so from the amounts of four notes being of corresponding amounts with the four notes above referred to.

Qu. by same. Were the four notes, C, D, E, and F, given at the date of the maturity of previous notes of which you allege that they were renewals?

Answer. I will not state positively that they were, for I don't know the fact here that they were renewals; but the note for $1,000, dated July 31, 1861, is the same date of the maturity of a note of a similar amount. The note for $850, dated Aug. 11, 1861, is of the same date of the maturity of a note of similar amounts; and the note of $750, dated August 25th, 1861, bears the same date of the maturity of a note for the same amount. The note of July 26, 1861, for $850, I
41 believe, stands for the note for the same amount due July 19, 1861; and I have no doubt that the notes now exhibited are renewals of the four notes above stated. I feel quite certain that these are renewals of the notes above mentioned, and I should not feel more certain if I had all of the books of the bank before me. Exhibit K, hereunto attached, is a copy from the bill-book of the bank, showing the dates and amounts of F. E. Eldred's notes as entered, covering a period from October 23rd, 1860, to January 2nd, 1862, furnished at the request of def'ts attorney, giving dates and amounts and time of running. In Exhibit I the debit of June 9, 1862, of $3,812.88, is for the amount of seven notes of $500 each, and interest, being $49.93, of Francis E. Eldred. The difference, $262.95, was passed to the credit of F. E. Eldred in special deposits, and was afterwards drawn out to apply on indebtedness of Francis E. Eldred to the Michigan Insurance Bank.

Ques. by same. Is it not the custom amongst the banks for parties renewing paper to give their checks for the paper maturing, the amount of the renewal notes being passed to their credit?

Answer. It is the custom of the Michigan Insurance Bank.

Qnes. by same. On the 14th day of August, 1861, did not Elisha Eldred, one of the defendants, have money on deposit in the Insurance Bank; and if so, how much?

Answer. That I cannot state; I have not the books here, and therefore I cannot now answer the question. I have since examined the books, and now state that I find no money at the credit of Elisha Eldred at that date in said bank.

Ques. by same. Do you know whether Elisha Eldred went to the bank on the 19th day of July, 1861, with F. E. Eldred, for the purpose of negotiating the money obtained upon the four notes?

Answer. I do not.

Ques. by same. When did you first know of the failure of Eldred & Balcom?

Answer. I cannot give you the date.

Ques. by same. Did you ascertain the fact of their failure from Elisha Eldred and F. E. Eldred, or from the public papers?

Answer. I cannot state how I became possessed of the information; I have no means of telling how or when I learned it. It was a common rumor that the firm had failed.

(Deponent being now asked to produce a copy of the private account of F. E. Eldred with the Michigan Insurance Bank, now produces a copy of said account, embracing the period between July 1, 1861, and October 1, 1861, which account is hereunto appended and marked Exhibit L.)

In regard to the debit of $1,080.87 of August 5, 1861, I think it must have been for a check of Mr. F. E. Eldred's, given for his note of $1,000, payable in New York or Albany, protested for non-payment, returned to us by our eastern correspondents and paid in Detroit, with the exchange and notarial fees. On August 14, 1861, Mr. E. N. Wilson was not the regular attorney of the bank. Mr. Tours may be considered
42 as the regular attorney of the bank at that time; but Mr. Sanger was in the habit of employing various attorneys.

WALTER INGERSOLL.

Sworn and subscribed before me April 14, 1865.

W'M D. WILKINS,
U. S. Commissioner, East'n Dist. of Michigan..

Exhibit L.—Marked by me, W'm D. Wilkins, U. S. com'r.

DR. Francis E. Eldred, in acc't with Michigan Insurance Bank. CR.

1861.		To balance	50	1861.		By cash	200 —
July	1	" cash	859 37	July	30	" dis	490 96
	26	" " 53,220	270 —		31	" "	834 63
	"	" "	150 —		"	" "	490 96
	27	" " 50,400	450 —	Aug.	5	" cash	340 60
	31	"	21 80		6	" "	100 —
Aug.	1	" " 50,100	150 —		10	"dis	981 92
	2	" " 1,010,87.50	1,060 87		13	" "	490 96
	5	" " 100,33.50	133 50		"	" cash	328 20
	6	" " 42 vouchers ret'd	135 —		"	" dis	490 96
	"	" " 61.55,22.87	84 42		17	" cash	273 70
	7	" " 50,39.90,50	139 90		20	" "	372 15
	8	" "	50 —		27	" "	461 31
	9	" " 50,60	110 —	Sept.	3	" dis	490 96
	10	" " 200,100,32.20,100	432 20		5	" cash	255 19
	13	" "	100 —		12	" balance	10 —
	14	" "	200 —		30		
	"	" " 36,75,50	161 —				
	15	" "	56 80				
	16	" "	25 —				
	17	" " 30,50	80 —				
	19	" " 164.25,51,19	215 44				

Exhibit L.—Continued.

DR. Francis E. Eldred, in acc't with Michigan Insurance Bank. CR.

	20	" "	131 59				
	23	" " 200,25	225 —				
	24	" " 25,100	125 —				
	27	" "	100 —				
	29	" " 100,38,75,25	163 75				
	30	" " 50,46,87,50	146 87				
Sept'r	2	" "	100 —				
Sept.	3	" "	114 82				
	"	" " 46,86,100,39 vouchers ret'd	146 86				
	4						
	5	" " 25,89,100	125 89				
	6	" "	89 —				
	9	" " 50,35	85 —				
	10	" "	123 41				
		7 vouchers ret'd	$6,612 49				$6,612 49
1861.				1861.			
Oct'r	1	To balance	10 —	Sept.	24	By dis	490 96
Sept'r	24	" cheque	490 96	Oct.	7	" "	490 96
ct'r	7		490 96			" balance	10 —
			$991 92				$991 92
1861.							
Oct'r	1	To balance	10 —				

43 *Exhibit K.—Marked by me, W'm D. Wilkins, U. S. com'r east dis't Mich.*

F. E. ELDRED.

				1860.			
320	F. E. Eldred, note	Eldred & Balcomb	Aug. 20	2 mos.	Oct'r 23, 60	1,000
426	" " "	" " "	Sept'r 11	2 "	Nov. 14, "	1,000
495	" " "	" " "	" 26	2 "	" 29, "	1,000
586	" " "	" " "	Oct'r 5	2 "	Dec'r 8, "	1,000
662	" " "	" " "	" 20	2 "	" 23, "	1,000
770	" " "	" " "	Nov. 12	2 "	Jan'y 15, 61	1,000
808	" " "	" " "	" 26	2 "	" 29, "	1,000
829	" " "	" " "	Dec'r 6	2 "	Feb. 9, "	1,000
858	" " "	" " "	" 20	2 "	" 23, "	1,000
				1861.			
894	" " "	" " "	Jan. 12	2 "	March 15, "	900
926	" " "	" " "	" 26	2 "	" 29, "	1,000
964	" " "	" " "	Feb. 7	2 "	April 10, "	1,000
1010	" " "	" " "	" 21	2 "	" 24, "	800
1083	" " "	" " "	M'ch 15	2 "	May 18, "	900
1104	" " "	" " "	" 27	2 "	" 30, "	1,000
1142	" " "	" " "	April 8	2 "	June 11, "	900
1175	" " "	" " "	" 22	2 "	" 25, "	750
1258	" " "	" " "	May 16	2 "	July 19, "	850
1310	" " "	" " "	" 28	2 "	" 31, "	1,000
1365	" " "	" " "	June 8	2 "	Aug't. 11, "	850
1401	" " "	" " "	" 22	2 "	" 25, "	700
1826	" " "	collateral	July 24	3 "	Oct'r 27, "	500
1827	" " "		" 26	3 "	" 29, "	850
1145	" " "		" 30	3 "	Nov. 2, "	500
1860	" " "	collateral	" 31	3 "	" 3, "	1,000
1876	" " "		Aug. 7	3 "	" 10, "	500
1898	" " "		" 14	3 "	" 17, "	500
1962	" " "		" 30	3 "	Dec. 3, "	500
2008	" " "	collateral	Sept'r 12	3 "	" 15, "	500
2014	" " "		Aug. 11	3 "	Nov. 14, "	850
2015	" " "		" 25	3 "	" 28, "	700
2044	" " "	collateral	Sept'r 18	3 "	Dec. 21, "	500
2092	" " "	"	" 30	3 "	Jan'y 2, 62	500

44 *Exhibit I.—Marked by me, W'm D. Wilkins.*

Dr. Special deposits. F. E. Eldred,
In acc't with Michigan Insurance Bank. Cr

1862.			1861.			
Feb'y 14	To cash	$380 00	Nov. 8	By cash		$200
June 9		3,812 88	19	"		200
Aug. 26		5 73	25	"		200
Oct'r 27		884 05	Dec'r 11	"		100
Dec'r 1	Balance	127 05	17	"		200
			31	"		200
			1862.			
			Jan. 20	"		156 43
			29	"		150
			Feb. 3	"		200
			11	"		380
			18	"		200
			25	"		200
			M'ch 5	"		200
			20	"		200
			Ap'l 8	"		175 40
			10	"		200
			29	"		200
			May 8	"		283 28
			16	"		167 77
			June 6	"		262 95
			20	"		22 78
			July 3	"		100
			11	"		100
			18	"		100
			25	"		95 17
			Aug. 12	"		100 66
			16	"		100
			Sept'r 3	"		8 22
			Oct'r 27	"		384 05
			Nov. 22	" to 2½ cords bark		123
		5,209 71				5,209 71
			1862.			
			Dec. 1	By balance		127 05

Said defendant further offered and read in evidence the following depositions of John Owen, Darius J. Davidson, and Alfred Russell:

John Owen, being of lawful age, and having been by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did depose and say as follows, to wit:

I reside in Detroit, Michigan; am president of the Michigan Insurance Bank, and have filled such post since 14 or 15 years ago; know Elisha and Anson Eldred; have never seen Uri Balcomb. (Exhibit B, attached to the deposition of F. E. Eldred, on file in this suit, shown to witness.) Cannot recall the time I first saw this note, but think it was since Mr. Sanger left the bank, a year ago last fall, in Sept'r, 1863; am not positive that I have seen it until a very recent period; knew that there was such a note; have been aware of it for years; got such information from
45 Mr. Sanger and Elisha Eldred; am not able to state definitely in regard to the time when the note came into the possession of the bank; do not know of any entry or memorandum in possession of the bank which would show the time; have no personal knowledge *for* the purpose for which the note was given to the bank. I always supposed it was a regularly discounted note until within the last week or ten days. My knowledge of the existence of the note was derived entirely from conversations with Mr. Sanger and Mr. E. Eldred. It was always spoken of as a regular debt due the bank, when it was spoken of at all. I cannot definitely state when I became aware that Eldreds and Balcom had become insolvent and were likely to fail. I know they did fail, but

I cannot tell whether I was promptly advised of it, or whether days or weeks elapsed before I found it out. It was some time in the spring of 1861. I can state that it was early in March, 1861, that I became aware, from the statements of Mr. Elisha Eldred to me, that he was fearful of serious embarrassments to the firm; but he did not state that there was danger of the firm becoming insolvent. (A letter being now shown to witness, which purports to be a copy of a letter on file in office of the clerk of the circuit court of Wayne County, Michigan, and now marked Exhibit B.) I suppose this is a copy of the letter of the same date, although I have no copy of the original, that I am now aware of, with which to compare it, I don't doubt it to be a correct copy of the original. Cannot state at what time I became aware of the actual failure of Eldreds and Balcom; have nothing with which to refresh my memory in regard to it. I do not recollect that Mr. Elisha Eldred, during the first half of the year 1861, frequently called on me to consult and devise in regard to his affairs. If he was then in Detroit, I have no doubt that he frequently called on me about his affairs; but I have no definite recollection in regard to it. I purchased some vessels from Eldreds and Balcom, in which I obligated myself to take up some paper which they had given to the Insurance Bank in purchase of some of the vessels. This was the paper of Eldreds and Balcom, and this purchase took place some time in March, 1861; don't remember when it was consummated precisely; E. Eldred purchased the vessels for Eldreds and Balcom. I have no reason to suppose that in August, 1861, Mr. Elisha Eldred had any moneys on special deposit with the bank or with myself.

Ques. by def't' att'y. Are you able to state whether Mr. Elisha Eldred has at any time since had deposits in the possession of the bank, or in your possession?

Answer. (The witness is advised, by his counsel, that the above question is irrelevant and improper here, and by the advice of his counsel, G. V. N. Lathrop, esq., he refuses to make answer to it.) I cannot state whether the $4,000 note, Exhibit B, covered all the liabilities of the firm of Eldreds & Balcom to the bank, on August 14th, 1861, the date when the note matured.

Ques. by same. Do you remember that Francis E. Eldred and Elisha Eldred called at the bank on the 19th day of July, 1861, to negotiate a loan of $4,000, to enable F. E. Eldred to buy bark and go on with his business?

46

Answer. I remember having a conversation with Elisha Eldred about advancing money to buy bark; cannot state whether they called together or separately; cannot state what year or month it was in. It was not in the bank, but in my private office in the same building. My recollection is that F. E. Eldred and E. Eldred did not call together. I cannot call to mind any time when they did call together. They may have done so, but I think not.

On cross-examination:

I had no personal knowledge of the taking of the $4,000 note by the bank. The discounting of paper and the financial management of the bank was conducted entirely by Mr. Sanger, the cashier. He was not in the habit of consulting me about discounting paper, except on rare occasions. Sometimes he would consult me, but it was very seldom. As president of the bank, I was not in the habit of overseeing its business or interfering with it. I was not a salaried officer of the bank. I have no recollection of Mr. Sanger's ever having spoken to me particularly as to how this $4,000 note was received. I had heard it spoken of

as a liability of Eldreds & Balcom, but in no respect differing from any other regularly discounted paper. It is only within the last week or ten days that I have heard the question raised as to the particular way in which this note was received; and I had no occasion before to investigate as to how the note was received. Mr. Sanger was not in the habit of consulting me as to taking securities unless it was some very special matter.

On redirect examination:

I do not know at whose request this $4,000 note was sent by the bank to Milwaukee for collection. I think it was before Mr. Sanger dissolved his connection with the bank.

J. OWEN.

Sworn and subscribed before me April 14, 1865.

W'M D. WILKINS,
U. S. Com'r East. Dist. of Mich'n.

Exhibit B.—Marked by me, W'm D. Wilkins, com'r.

Exhibit A.

DETROIT, *August 9th*, 1861.

Mr. ANSON ELDRED:

DEAR SIR: In reply to the inquiry in your favor, of the 6th inst., I would say that in conversation with your brother Elisha, about the last of last March, he then told me of the serious embarrassments of the firm of Eldred & Balcom, and said he could not see his way clear to carry the business of the firm along and meet the large engagements they would have falling due soon after the opening of navigation,
47 and feared that suits would be instituted to compel payment; that four of your vessel' would be grain-carrying, and that in their trips to Buffalo and Lake Ontario they would be peculiarly exposed to arrest; that he was engaged in making large repairs to the vessels, and very much needed money to pay his bills; that he had made up his mind that the vessels must be sold, and preferred that I should buy them, particularly as he was anxious to pay an old debt due by your firm to the Michigan Insurance, and which they had been made by the sale of sundry vessels by the bank of your firm, and of which the Mason was one and the Pilgrim another. Whereupon I agreed to make the purchase, and did buy the Burns, Montezuma, Mason, and Pilgrim for $26,500, and paid the amount by taking up the notes due by your firm to the bank, amounting to $13,110, and paid in cash, in March and April, 13,370, all of $26,500, which I am told is entered in detail on the books of your firm in Chicago, and has been exhibited to you. I did not assume to pay any claims against the vessels, but they were to be delivered to me free from debt. I have, however, since been required to endorse a large amount of paper turned out to parties to whom the vessels were indebted, to protect them from arrest, your brother not having been able to pay the bills, as he expected to when the sale was made.

Very respectfully, yours,
(Signed) J. OWEN.

DARIUS J. DAVIDSON having been by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and

nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows:

I reside in Detroit, Michigan; am an attorney and counsellor-at-law. On the 31st day of March, 1863, at the request of Mr. Anson Eldred, I examined the original files of this circuit court at Detroit, in the case of the Michigan Insurance Bank against Anson Eldred, Elisha Eldred, and Uri Balcom, an attachment case. (The note, marked Exhibit B, attached to the deposition of Francis E. Eldred, on behalf of the pl'tiffs in this cause, being now shown to witness, he says:) This note formed a part of the files which I examined, as stated above. There was no certificate of protest attached to it at that time, as there is now. I have no recollection of observing that there was any evidence or appearance of any certificate of protest or other paper having been once attached to it or subsequently removed. Mr. Anson Eldred and I were together when we examined it, and conversed about the absence of any certificate of protest. The only paper attached to it at all was a small slip containing a memorandum of judgment, made by the clerk. The two papers now produced by me, marked Y and Z, attached together, are precise copies of the note and the slip attached to it, as they appeared when I examined the files, as above stated. I placed my *originals* on the original note and on the two copies above referred to. I have examined a file of the Detroit Daily Tribune, published in Detroit,
48 and specially that paper of date July 12, 1861, which I now here produce. In the column, on the fourth page thereof, headed "commercial," there appears a notice of the Chicago lumber-market, and therein a notice of the failure of the lumber-firm of Eldreds & Balcom, in the words following: "During the past week two of the heaviest firms in the city have virtually given up business, that of Messrs. Loomis and Ludington, who have sold out to Mr. Brower, their bookkeeper, and that of Messrs. Eldreds & Balcom, who have sold their stock here to the Merchant Loan and Trust Company, and their stock at the mills to a house in Milwaukee."

D. J. DAVIDSON.

Sworn and subscribed before me on April 14, 1865.

W'M D. WILKINS,
U. S. Com. East. Dist. of Mich'n.

ALFRED RUSSELL being of sound mind and of lawful age, and having been by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in said matter of controversy, did depose and say:

I annex hereto a duplicate original of the "P. Jewell & Sons' contract," assigned to the plaintiffs and mentioned in the deposition of Francis E. Eldred and Walter Ingersoll. I drafted the two orig-
49 inals, and my signature, as attesting witness, is upon the paper annexed. (Contract referred to hereto attached, and marked Exhibit F.)

ALFRED RUSSELL.

Sworn and subscribed before me on April 14, 1865.

W'M D. WILKINS,
U. S. Com'r East'n Dis'ct Mich'n.

Anson Eldred, defendant, was then sworn, and testified that Eldreds & Balcom confessed a judgment in favor of the State Bank of Wiscon-

sin, July 10th, 1861. It was done at Milwaukee. Elisha Eldred was present at that time, and left them to go to Detroit.

(The witness produces a letter purporting to have been written by Francis E. Eldred to the witness, Anson, from Detroit, bearing date July 20th, 1861, which mentioned an interview with Elisha, at Detroit, on the day previous to its date.)

Question by defendant's counsel. Did you and your brother Elisha, in July, 1861, hold the title to certain property in Detroit which belonged to Frances E. Eldred?

(Objected to; objection sustained, and defendant excepted.)

Elisha Eldred recalled, and is shown the letter produced by last witness, and, after reading it, stated that his memory was thereby refreshed, and that he was in Detroit July 19th, 1861, and on that day had a talk with John Owen, at the Michigan Insurance Bank; went there with Francis to help him make arrangements about his mat-
50 ters. The note in question was not delivered to the bank at that time. I had at that time a conversation with Mr. Owen. I don't recollect anything I said to him. I was intimate with him. I recollect conversing about F. E. Eldred's matter. Nothing was said about my signing his paper as security. Have no recollection of saying anything about the failure of Eldreds & Balcom. My brother had been using our endorsements at the bank. I do not know that Owen knew that we had stopped. The witness stated that nothing was said, in that interview, about the note in suit.

The defendants' counsel then offered in evidence a certified copy of the record of a judgment entered on this note in the circuit court for Wayne County, in the State of Michigan.

To which plaintiff's counsel objected, and requested defendants' counsel to state the object of the testimony.

The defendants' counsel stated that the record was offered,

First. As corroborative proof that the note was fraudulently made, and made on the day that said suit was commenced in said Wayne circuit court, Michigan.

Second. That said judgment was a bar to a recovery on this note in suit.

51 The defendants' counsel, in answer to a question from either the court or counsel, admitted that said suit was an attachment suit, and that there was no personal service of process on defendant.

The court then overruled plaintiff's objection, and admitted said record in evidence.

That it appears from said judgment-record that, on the 14th day of August, A. D. 1861, a suit was instituted in the circuit court for the county of Wayne, in the State of Michigan, to recover the amount due upon the note in question, of the said firm of Eldreds & Balcom, as endorsers of said note, in which said suit the said The Michigan Insurance Bank was plaintiff, and the said Anson Eldred, Elisha Eldred, and Uri Balcom were defendants; that, on the said 14th day of August, A. D. 1861, a certain writ of attachment was issued in said suit, out of and under the seal of said court, and directed to the sheriff of said county of Wayne, commanding him to attach so much of the land, tenements, goods, chattels, moneys, and effects of the defendants, Anson Eldred, Elisha Eldred, and Uri Balcom, not exempt from execution, wheresoever the same might be found within the county of Wayne, as would be sufficient to satisfy the demand of said plaintiff, and safely keep
52 the same to satisfy any judgment that might be recovered by the plaintiff in said attachment; also commanding him to summon

said defendants, if to be found within said State, to appear before said court, at the court-house in the city of Detroit, on Tuesday, the third day of September, at nine o'clock in the forenoon of said day, to answer the plaintiff, and of said writ make due return; that afterwards, and on the 4th day of September, A. D. 1861, said sheriff made return of said writ; that, by virtue thereof, he had attached certain property, named in his return; and further returned that, after due search and diligent inquiry, he was unable to find Anson Eldred, Elisha Eldred, and Uri Balcom, the defendants, in said attachment named, in his bailiwick.

It further appears, from said judgment-record, that afterwards, and prior to the 16th day of December, 1861, an attachment notice, in said suit, was duly published in the Detroit Free Press, a newspaper published and circulating in said county of Wayne and State of Michigan, which said notice was in the words and figures following, to wit:

"*Attachment notice.*

"Notice is hereby given that a writ of attachment was issued out
53 of the circuit court for the county of Wayne, State of Michigan, on the 14th day of August, A. D. 1871, in favor of the Michigan Insurance Bank against Anson Eldred, Elisha Eldred, and Uri Balcom, for the sum of six thousand seven hundred dollars, ($6,700,) and certain property of said defendants, Anson Eldred and Elisha Eldred, has been attached thereunder, but said writ was not served upon either of the defendants, for the reason that neither could be found in said county, and said defendants have not appeared in the suit commenced by said writ.

"Dated Detroit, Sept. 24th, 1861.

"E. N. & O. B. WILCOX,
"*Plaintiff's Attorneys.*"

It further appears from said judgment-record, that on the 16th day of December, A. D. 1861, the appearance of said defendants, by the plaintiff's attorneys, was entered on the common rule-book kept in the office of the clerk of said court, which said appearance was in the words and figures following, to wit:

"THE MICHIGAN INSURANCE BANK
"*vs.*
"ANSON ELDRED, ELISHA ELDRED, & URI BALCOM. } In attachment.

"DECEMBER 16, 1861.

"In this cause, on filing affidavit of due publication of notice of attachment, and on motion of E. N. & O. B. Wilcox, plaintiff's attorneys, it is ordered that the appearance of said defendants be, and the same is
54 hereby, entered.

"E. N. & O. B. WILCOX, *Pl'ff's Att'ys.*"

It further appears from said judgment-record, that on the 16th day of December, A. D. 1861, the plaintiff in said suit filed its declaration therein, which said declaration contained the common money counts in assumpsit, together with a notice that on the trial of said cause, the plaintiff under said money counts would give in evidence the note in question, a copy of which said note was attached to said notice, as follows, to wit:

"$4,000. DETROIT, *June 12th*, 1861.

"Sixty days after date I promise to pay to the order of Eldreds & Balcom four thousand dollars, at the Michigan Insurance Bank, value received.

(Signed) "F. E. ELDRED.

(Endorsed:) "Eldreds & Balcom."

It further appears from said judgment-record, that on the 27th day of December, A. D. 1861, the said defendant, Anson Eldred, filed his plea in said suit, of which the following is a copy, to wit:

"The circuit court for the county of Wayne.

"THE MICHIGAN INSURANCE BANK
"*vs.*
"ANSON ELDRED, ELISHA ELDRED, AND URI Balcom. } Plea non assumpsit, with notice of set-off.

"And the said Anson Eldred, one of the defendants in this suit,
55 by Walker & Kent, his attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

"WALKER & KENT,
"*Atty's for Anson Eldred.*

"Please take notice, that the said defendants on the trial of the above cause, will insist upon and give in evidence under the general issue above pleaded, that the said plaintiff, at the time of the commencement of the action aforesaid, against the said defendant, was, and still is, indebted unto said defendant in the sum of one hundred thousand dollars, lawful money of the United States of America, for divers goods, wares, & merchandise, before that time sold and delivered by the said defendants to the said plaintiff, and at the special instance and request of the said plaintiff.

"And in the further sum of twenty thousand dollars of like lawful money, for the work and labor, care & diligence of the said defendants, by the said defendants, before that time done, performed, and bestowed in and about the business of the said plaintiff and for the said plaintiff, and at the like request of the said plaintiff.

"And in the further sum of ten thousand dollars of like lawful money, for so much money before that time lent and advanced by the said defendants to the said plaintiff, and at the like request of said plaintiff.

56 "And for other money by the said defendant before that time paid, laid out, and expended for the said plaintiff, and at the like request of the said plaintiff.

"And for other money by the said plaintiff before that time had received, to & for the use of the said defendant.

"And also that the said plaintiff, before the commencement of this action, accounted together with the said defendant of & concerning the said demand of the said plaintiff against the said defendant, and also of & concerning divers other sums of money and accounts between the said plaintiff and the said defendant, and upon such accounting the said plaintiff was found to be in arrears and indebted to the said defendant in the further sum of five thousand dollars of like lawful money, which the said plaintiff undertook, and then and there faithfully promised

the said defendants well and truly to pay unto the said defendant when the said plaintiff should be thereunto afterwards requested.

"Which several sums of money, or so much thereof as will be sufficient for that purpose, the said defendant will set off against the demand of the said plaintiff, to be proved at the trial, and have the balance
57 certified in favor.

"Dated the 27th day of December, 1861.

"Yours, &c.,

"WALKER & KENT,
"*Attorneys for Defendant, Anson Eldred.*

"To E. N. and O. B. WILCOX, Esq's,
"*Attorneys for Plaintiff.*"

It further appears from said judgment-record, that, on the 22nd day of April, A. D. 1862, the following proceedings were had in said suit, to wit:

"At a session of the circuit court for the county of Wayne, held at the court-house, in the city of Detroit, on the twenty-second day of April, in the year one thousand eight hundred and sixty-two—

"Present, Hon. B. F. H. Witherell, circuit judge.

"THE MICHIGAN INSURANCE BANK
"*vs.*
"ANSON ELDRED, ELISHA ELDRED, & URI Balcom.

"This cause, coming on to be heard, the plea of the defendants, heretofore pleaded by them, is withdrawn, on motion of Walker and Kent, their attorneys."

It further appears from said judgment-record, that, on the 22nd day of April, A. D. 1862, the default of the said defendants, Elisha Eldred and Uri Balcom, was entered in said suit, and that, on the 10th day of May, A. D. 1862, said default was made absolute.

It further appears from said judgment-record, that, on the
58 thirteenth day of May, A. D. 1862, a judgment was entered in said suit, as follows, to wit:

"At a session of the circuit court for the county of Wayne, held at the court-house, in the city of Detroit, on the thirteenth day of May, in the year one thousand eight hundred and sixty-two—

"Present, Hon. B. F. H. Witherell, circuit judge.

"THE MICHIGAN INSURANCE BANK
"*vs.*
"ANSON ELDRED, ELISHA ELDRED, AND URI Balcom.

"The plea of the defendant, Anson Eldred, heretofore pleaded by him, having been withdrawn, and the default of the defendants, Elisha Eldred and Uri Balcom, having been duly entered, and the same having become absolute, and the damages of the said plaintiff, on occasion of the premises, having been duly assessed at the sum of four thousand two hundred and eleven dollars and fifty-six cents over and above their costs and charges by them about their suit in this behalf expended. Therefore, it is considered that said plaintiffs do recover against said defendants their damages aforesaid, together with their costs aforesaid to be taxed, and that said plaintiff have execution therefor."

The defendant then rested his case.

59 The above and foregoing is all of the evidence given or offered upon said trial.

And thereupon, defendant's counsel requested the court, in writing, to charge the jury as follows, to wit:

"1st. If the jury believe, from the evidence, that this note was not negotiated or put in circulation until after the dissolution of Eldreds & Balcom, and after the plaintiff had notice of such dissolution, then the plaintiff cannot recover."

Which said instruction the court then and there refused to give, because there was no evidence on the subject; to which refusal defendant's counsel then and there excepted.

"2nd. That, if the jury believe that John Owen, the president of said bank, had notice of the dissolution of said firm at the time the plaintiff received said note, that that was notice to said plaintiff."

Which instruction the court then and there refused to give, because there was no evidence on the subject; to which refusal defendant's counsel then and there excepted.

"3rd. That if, at the time Elisha and Francis called on said John Owen, as president of the bank, to negotiate a loan, he was then informed of said dissolution, it was sufficient notice to the plaintiff, and that if it afterwards received said paper from Francis E. Eldred, it cannot recover."

60 Which said instruction the court then and there refused to give, because there was no evidence on the subject; to which refusal defendant's counsel then and there excepted.

"4th. That, if Elisha and Francis, on the 19th July, negotiated with John Owen, president, for the loan for which the bank now claims to hold said note, and was then informed that Eldreds & Balcom had dissolved, and afterwards took said note, the plaintiff cannot recover."

Which said instruction the court then and there refused to give, because there was no evidence on the subject; to which refusal defendant's counsel then and there excepted.

"5th. That if the plaintiff took the note from Francis, the maker, it was notice to them that it was not commercial paper, and that they are not bona fide holders thereof."

Which said instruction the court then and there refused to give; to which refusal the defendant's counsel then and there excepted.

"6th. That the alteration of the date of said note from 'Aug't' to 'June,' is strong presumptive evidence that said note was not made until August."

Which said instruction the court then and there refused to give; to which refusal defendant's counsel then and there excepted.

61 "7th. That the record of the judgment in the circuit court for Wayne County, Michigan, is a bar to this action on this note."

Which said instruction the court then and there refused to give; to which refusal defendant's counsel then and there excepted.

"8th. That the notice of the dissolution of defendants, published in the Detroit Tribune, July 12th, and proved here, without any objection on the part of the plaintiff, is some evidence that plaintiff had notice of said dissolution, and that if the jury believe from all the evidence that plaintiff had such notice before taking said note, then the plaintiff cannot recover."

Which said instruction the court then and there refused to give; to which refusal defendant's counsel then and there excepted.

And thereupon the court, (Justice Davis,) charged said jury as follows, to wit:

The jury are instructed in this case that the plaintiffs are entitled to recover the amount of the debt for which the note in suit was given as collateral, with interest. The note is proved to have been negotiated before it was due by the maker to the bank, and not being paid at maturity, was regularly protested and endorsers notified thereof.

62 In such a case their liability arises. It is objected by way of defence that the bank knew, when it got this note, that the firm of Eldreds & Balcom was dissolved, and that therefore the bank cannot recover. But the court instructs you that on this point there is no sufficient evidence to charge the bank with notice of this fact.

To which said charge, and to each and every part thereof, the defendant's counsel then and there expected.

And because none of the said rulings, decisions, & exceptions appear in the record of the proceedings of this cause, we have at the request of the defendant, Anson Eldred, hereto set our hands & seals, at Oshkosh, this 8th day of July, 1871.

DAVID DAVIS. [SEAL.]
A. G. MILLER. [SEAL.]

JULY 14, 1871.—This day came the defendant, Anson Eldred, and filed his bond with Robert W. Pierce as surety, in the penalty of eight thousand dollars, conditioned that the said defendant shall prosecute a writ of error to effect, and answer all damages and costs if he fail to make his plea good, which bond is approved by the district judge, and is as follows, to wit:

63 *Bond for supersedeas.*

Circuit court of the United States, eastern district of Wisconsin.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, IMPLEADED WITH ELISHA Eldred and Uri Balcom.

Know all men by these presents, that we, Anson Eldred, of the city of Milwaukee, in the State of Wisconsin, as principal, and Robert W. Pierce, of the same place as surety, are held and firmly bound unto the Michigan Insurance Bank in the sum of eight thousand dollars lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, signed with our hands and sealed with our seals this eleventh day of July, A. D. 1871.

Provided, however, that whereas the above-named Anson Eldred is about sueing out a writ of error to the circuit court of the United States for the eastern district of Wisconsin, from the Supreme Court of the United States, to reverse a judgment rendered against him, said Anson Eldred, by said circuit court in favor of the said, The Michigan Insurance Bank, at the July term, A. D. 1871.

64 Now, therefore, if the said Anson Eldred shall prosecute his said writ to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise, in force.

ANSON ELDRED. [SEAL.]
ROBERT W. PIERCE. [SEAL.]

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Robert W. Pierce, being duly sworn, deposes and says, that he resides in the city of Milwaukee, and State of Wisconsin, and is a freeholder within said State; that he is worth the sum of sixteen thousand dollars over and above all his debts, liabilities, and exemptions.

ROBERT W. PIERCE.

Sworn to before me this 14th day of July, A. D. 1871.

ALFRED L. CARY,
Notary Public, Milwaukee Co., Wis.

(Endorsed:) July 14, 1871. Approved.

A. G. MILLER,
District Judge.

Order for supersedeas.

Whereupon it is ordered that execution be superseded, and thereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendant in error.

65 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The Michigan Insurance Bank vs. Anson Eldred, impleaded with Elisha Eldred & Uri Balcom.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said eastern district Wisconsin, this twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States, the ninety-sixth.

[SEAL.] EDWARD KURTZ, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The Michigan Insurance Bank, plaintiff, and Anson Eldred, impleaded with Elisha Eldred & Uri Balcom, defendant, a manifest error hath happened, to the great damage of the said Anson Eldred, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of

December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. Wisconsin.

(Endorsed.) Filed July 14, 1871. Edw. Kurtz, clerk.

67 The United States of America to The Michigan Insurance Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein Anson Eldred, impleaded with Elisha Eldred and Uri Balcom, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth.

[SEAL.]

A. G. MILLER,
District Judge.

We accept service of above citation this 17th day of July, A. D. 1871.

FINCHES, LYNDE & MILLER,
Att'ys for Michigan Ins. B'k.

(Indorsement on cover:) No. 520. Anson Eldred, plaintiff in error, vs. The Michigan Insurance Bank. E. Wisconsin C. C. U. S. Filed 11 December, 1871.

Supreme Court, United States.

ANSON ELDRED,

Plaintiff in Error,

against

THE MICHIGAN INSURANCE BANK,

Defendant in Error.

No. 70, October Term, A. D. 1873.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

JOHN W. CARY,
Of Counsel.

Milwaukee News Company, Book and Job Printers.

Supreme Court, United States.

No. 70, October Term, 1873.

ANSON ELDRED,
Plaintiff in Error.

vs.

THE MICHIGAN INSURANCE BANK,
Defendant in Error.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by the defendant in error, against the plaintiff in error, and Elisha Eldred and Uri Balcom, as partners under the firm name of Eldreds & Balcom, as endorsers of a promissory note made by F. E. Eldred, as follows :

$4,000. Detroit, June 12th, 1861.

Sixty days after date I promise to pay to the order of Eldreds & Balcom, four thousand dollars at the Michigan Insurance Bank, value received.

(Signed) F. E. ELDRED.

(Endorsed) ELDREDS & BALCOM.

The declaration contained a special count upon the note against the Eldreds & Balcom as endorsers, and also the common counts with a copy of the note and endorsement annexed, and notice that the same will be given in evidence under the common counts. (Record, pp. 2, 3, 4 and 5.)

The plaintiff in error, Anson Eldred, alone was served or appeared, (record, p. 2,) and he filed a plea of the general issue. (Record, p. 5.)

The plaintiff below had a verdict and judgment for the amount of a debt and interest, for which it was claimed that the note was given as collateral security with costs. (Record, pp. 9, 10, 37.)

This cause was in this court upon a former writ of error, judgment upon the first trial below having been for the present plaintiff in error, which judgment was reversed in this court, see 9 Wallace 544.

The questions now raised were not then adjudicated, as they arise upon the rulings of the court below upon certain evidence, which was not offered upon the first trial.

Upon the second trial below, the record of which is here for review, the plaintiff in error offered in evidence a duly certified copy of a judgment record of the Circuit Court of the County of Wayne, in the State of Michigan, showing that on the 13th day of May, 1862, the plaintiff below recovered judgment upon the note in suit against the defendant Anson Eldred, and said Elisha Eldred and Uri Balcom, for the sum of $4,211.56, damages and costs. This record was offered in evidence in bar of this action, (Record, p. 32,) and after the plaintiff below had offered in evidence the note sued upon and proof tending to show presentment thereof for payment, dishonor and notice thereof to the endorsers, and had rested his case.

The facts as to this judgment record appear at pages 32 to 35.

They briefly are, that August 14th, 1861, the plaintiff below instituted a suit in the Circuit Court for Wayne County, Michigan, against said Eldreds & Balcom; that on that day, a writ of attachment issued in said action to the sheriff of said county,

who returned upon the same that he had attached certain property named in his return, and that he was unable to find any of the defendants named in the writ in his bailiwick; that prior to December 16th, 1861, an attachment notice in said suit was published in the Detroit Free Press, a newspaper of said county; that December 16th, 1861, the plaintiff's attorneys on filing proof of due publication of said notice of attachment, entered the defendant's appearances in the common rule book of said court; that on the same day the declaration was filed in said cause, it being in the common money counts, with a copy of the note in question attached, and notice that on the trial said note would be given in evidence under the declaration so filed; that December 27th, 1861, said Anson Eldred, (plaintiff in error here,) by Walker & Kent, his attorneys, filed his plea to said declaration, it being the general issue, with notice of sundry set offs against the plaintiff's demand.

The record further showed the following proceedings: (p. 35.)

"At a session of the Circuit Court for the County of Wayne, held at the Court House, in the city of Detroit, on the twenty-second day of April, in the year one thousand eight hnndred and sixty-two.

"Present Hon. B. F. H. Witherill, Circuit Judge.

THE MICHIGAN INSURANCE BANK,
vs.
ANSON ELDRED, ELISHA ELDRED AND URI BALCOM.

"This cause coming on to be heard, the plea of the defendants pleaded by them is withdrawn on motion of Walker and Kent, their attorneys."

The judgment record further showed that April 22d, 1862, the default of said Elisha Eldred and Uri Balcom was entered, and that May 10th, 1862, said default was made absolute, and that May 13th, 1862, judgment was entered in said suit, as follows:

"At a session of the Circuit Court for the county of Wayne, held at the court house in the city of Detroit, on the thirteenth

day of May, in the year one thousand eight hundred and sixty-two. Present, Hon. B. F. Witherell, Circuit Judge.

THE MICHIGAN INSURANCE BANK,
vs.
ANSON ELDRED, ELISHA ELDRED AND URI BALCOM.

"The plea of the defendant, Anson Eldred, heretofore pleaded by him having been withdrawn, and the default of the defendants, Elisha Eldred and Uri Balcom, having been duly entered, and the same having become absolute, and the damages of the said plaintiff on occasion of the premises having been duly assessed at the sum of four thousand two hundred and eleven dollars and fifty-six cents over and above their costs and charges by them about their suit in this behalf expended. Therefore it is considered that said plaintiffs do recover, against said defendants, their damages aforesaid together with their costs aforesaid to be taxed, and that said plaintiff have execution therefor." (Page 35.)

ASSIGNMENTS OF ERROR.

1st. The court below erred in refusing to charge the jury as requested by the defendant below, in his seventh instruction asked, which was in these words:

"7th. That the record of the judgment in the Circuit Court for Wayne County, Michigan, is a bar to this action on this note." (Record, p. 36.)

2d. The court below erred in its charging the jury in these words: (Record, page 37,) to wit:

"The jury are instructed in this case that the plaintiffs are entitled to recover the amount of the defendant, for which the note in suit was given as collateral, with interest. The note is proved to have been negotiated before it was due, by the maker to the bank, and not being paid at maturity was regularly pro-

tested and endorsers notified thereof. In such a case liability arises. It is objected by way of defence that the bank knew when it got this note that the firm of Eldreds & Balcom was dissolved, and that therefore the bank cannot recover. But the Court instructs you that on this point there is no sufficient evidence to charge the bank with notice of the fact."

Due exceptions to the charge and refusal to charge as requested were taken. (Record, pp. 36 and 37.)

BRIEF OF THE ARGUMENT.

The cause presents the following questions for argument and decision :

1st. Was the judgment shown in the record offered, *and which the court below admitted in evidence, notwithstanding plaintiff's objection*, (Record, p. 51,) binding upon and valid against the plaintiff in error upon the note sued upon in this case? And

2d. Was the record admissable as a bar, and did it constitute a bar to this action ?

I.

Th suit was commenced August 14, 1861, and on the same day a writ of attachment was issued, and the sheriff returned that he had attached property, but made a *non est* return as to defendants. (Record, pp. 32 and 33.) Publication notice under the laws of Michigan was given, and thereupon defendant's appearance, under the practice of Michigan, was entered and the declaration was filed December 16, 1861. (Record, p. 33.) The defendant Anson Eldred (plaintiff in error here) filed his plea of non-assumpsit and notice of-set off December 27, 1861. (Record, p. 34.)

This plea was afterwards, April 22, 1862, withdrawn by his attorneys on the day when as the record shows *the cause came on to be heard*, (Record, p. 35,) and judgment passed against him.

The appearance and plea was equivalent to personal service of process. It was a case where jurisdiction *as to the person alone* was necessary to be acquired, in order to render the judgment valid and binding.

Appearing and pleading to the merits gave the Michigan court full jurisdiction of the cause and of the person of the defendant Anson Eldred, notwithstanding his subsequent withdrawal of his plea, and such subsequent withdrawal of the plea would not divest the court of the full jurisdiction that it had previously acquired.

Pollard & Pickett vs. Dwight, 4 Cranch. 421.
Farrar & Brown vs. U. S. 3 Peters, 459.
Shields vs. Thomas, 18 How. 253.
Tolland vs. Sprague, 12 Peters, 300, see 331.
Jones vs. Andrews, 10 Wallace, 327.

II.

The plaintiff in error claims that the judgment thus obtained was admissable in evidence under the plea of the general issue and was a bar to this, it being another suit on the same note there sued and recovered upon. This was directly adjudged in the case of *Mason vs. Eldred*, 6 Wallace, 231.

In that case this court, delivering its opinion through Mr. Justice Field, says:

"If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissable, for it has long been settled that under the plea of the general issue in assumpsit, evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit." And the following cases are cited to the doctrine:

Young vs. Black, 7 Cranch. 565.
Young vs. Rummell, 2 Hill, 480.

JOHN W. CARY,
Of Counsel for Plaintiff in Error.

9th Wallace—

SUPREME COURT

OF THE

UNITED STATES.

No. 70.

ANSON ELDRED, PLAINTIFF IN ERROR,

VS.

THE MICHIGAN INSURANCE BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF

FOR

DEFENDANT IN ERROR.

A. FINCH, *Counsel for Defendant in Error.*

[LAWRENCE MILLER, PRINTER, MILWAUKEE.]

UNITED STATES

SUPREME COURT.

ANSON ELDRED,
Plaintiff in Error,
vs
THE MICHIGAN INSURANCE BANK,
Defendant in Error.

This action was commenced by the Michigan Insurance Bank against Elisha Eldred, Anson Eldred, and Uri Balcom, co-partners in trade under the name, firm and style of Eldreds & Balcom, to recover the amount due on a promissory note dated Detroit, June 12th, 1861, executed by F. E. Eldred, in and by which note said Eldred, for value received, promised to pay to the order of Eldred & Balcom, four thousand dollars, sixty days after date. The note was endorsed "Eldreds & Balcom."

The plaintiff to prove its cause of action, introduced the note in evidence, and gave due proof of its presentment for payment, its non-payment, and due notice to the endorsers.

The defendant, Anson Eldred, was the only one of the firm of Eldreds & Balcom, served with process. He appeared, and by his attorneys filed a plea of the general issue. Under that plea he of-

fered evidence for the alleged purpose of showing that the true date of the note sued upon was *August* instead of *June*; that August was written, then erased, and June inserted. The note, upon its face, shows that the word "August" had been written and altered into "June." It was, however, clearly proven by F. E. Eldred, the maker of the note, that the note was, in fact, executed, and by him delivered to the plaintiff, on the day of its date, (June 12th, 1861,) that he deposited the note with the plaintiff as collateral security for advances made, or to be made to him by the plaintiff, and that he did, from time to time, obtain discounts from the plaintiff upon the credit of said note.

It also appears, from the evidence offered by the defendant, that F. E. Eldred, Anson Eldred and Elisha Eldred were brothers; that F. E. Eldred was engaged in business in Detroit, and that the firm of Eldreds & Balcom were engaged in business in Chicago; that F. E. Eldred was in the habit of furnishing blank notes, endorsed by himself, to the firm of Eldreds & Balcom, and the firm of Eldreds & Balcom were in the habit of endorsing blank notes, and furnishing them to F. E. Eldred, with the understanding that the holders of said blank notes were authorized to fill them up in such amounts as they might require in the prosecution of their business.

At folio 27, page 14, of the printed case, F. E. Eldred says: "I had an arrangement with the firm of Eldreds & Balcom, by which they endorsed my notes and I endorsed theirs, and the endorsements were made in blank and were filled up by the holders as they wished to use them; this note (meaning the note in suit) was endorsed in that way. and this arrangement was known to Anson Eldred, as well as to the other partners."

Elisha Eldred testifies, at folio 24, page 13, "that the notes that he endorsed in blank, for F. E. Eldred, were in a bound book; that he endorsed different books of notes; that when one book was used up he endorsed another, but could not tell whether the notes he endorsed were numbered or not."

No witness was called to disprove the testimony of F. E. Eldred, as to the actual date of the note and its deposit by him with the

plaintiff for the purposes stated by him. The firm of Eldreds & Balcom was dissolved prior to August, but not prior to June.

The defendants also offered in evidence a certified copy of a record of a suit brought in the Circuit Court of Wayne county, Michigan, by the plaintiff, against Elisha Eldred, Anson Eldred and Uri Balcom, to recover the amount of the note in this suit. The offer to introduce this record will be found at folios 50 and 51, page 32, of the printed case. It will there be seen that at the time the counsel of the defendant offered this record (in response to a question asked by either the Court or the counsel of the plaintiff,) he distinctly affirmed "*that said suit was an attachment suit, and that there was no personal service of process on defendant.*" It will further be observed that he offered the record for two distinct purposes.

1st. As corroborating proof that the note was fraudulently made, and made on the day that said suit was commenced in said Wayne Circuit Court, Michigan.

2nd. As a bar to this action on this note. With this statement of the purpose for which the record was offered, and in connection with this distinct affirmation of the character of the record, the presiding Judge allowed the same to be admitted in evidence, without stating or assigning any reasons for its admission. It is evident that it was not and could not have been admitted as a bar to the action, if the counsel of the defendant told the whole truth when he said it was "an attachment suit, and that there was no personal service of process on defendant."

It now appears, from the statement of the contents of the record, as presented by the Bill of Exceptions in this cause, that the defendant, Anson Eldred, by his attorneys, Walker & Kent, filed a plea of the general issue and notice of set-off, and which plea was before the case was brought to trial withdrawn by leave of the Court. (Folio 57, page 35.)

No intimation was given to the presiding Judge, or to the counsel of the plaintiff, on the trial of this cause, that said record contained the said plea and notice of set-off. But after the close of the testimony the counsel for the defendant handed up several instructions

which he desired given to the jury. They will be found on page 36 of the printed case. Among the instructions was the following: "*That the record of the judgment in the Circuit Court for Wayne County, Michigan, is a bar to this action on this note.*" This was refused, and doubtless for the reason that His Honor, the presiding Judge, must have understood and believed, from the statement made by the counsel of the defendant, that it was simply and only the record of an attachment suit, and was of no more force or effect to bind the defendant than a mere proceeding by attachment without personal service of process.

The Bill of Exceptions does not disclose the fact that any other or different statement was made as to the character of the record offered in evidence, than that it was a suit commenced by attachment and no personal service. The counsel of the defendant did not, at any time, intimate that the copy of the record introduced by him, showed a plea filed by the defendant, or that the same had been withdrawn. *That fact was suppressed.* Under the charge of the presiding Judge, a verdict was rendered for the plaintiff.

ARGUMENT.

This case has been once before this court, and is reported in the 9th Wallace, 544. The same evidence as to the alleged alteration of the date of the note, its negotiation to the plaintiff, and the effect of filling up the blank, was then in the record; and the opinion of the Court is full and clear that the plaintiff is entitled to recover upon the note.

The rulings of the presiding Judge were in strict accordance with the law, as announced in the opinion of this Court. We see no error, either in the admission of testimony, or the charge of the presiding Judge, or in the refusal to give instructions asked by the counsel of the defendant on the general merits of the case.

The only point we deem worthy of notice is the refusal to give the instruction "that the record of the Circuit Court of Wayne county, Michigan, was a bar to this action on this note."

There was no error in refusing this instruction, and for the following reasons:

1st. The statement of the counsel of the defendant at the time he offered the copy of the record in evidence, that it was "*a suit commenced by an attachment, and that there was no personal service of process*" was a representation of such a character, and made under such circumstances, that now to allow the defendant to allege that said record shows an appearance duly entered in said suit by said defendant, would be to impute a fraud by the learned counsel of the defendant upon the court; it would be, in effect, permitting the defendant to allege, as a ground of reversal, a fact which he must have known was in the record when he offered it, and which fact he must have intentionally suppressed.

The defendant ought not to complain if the presiding Judge *assumed the record to be what his counsel represented it to be.* It is certain that the presiding Judge, and the counsel for the plaintiff, were led to believe, by the statement of the counsel, that the record was not binding upon the defendant, Anson Eldred.

The statement that the suit was an "attachment suit without personal service of process on the defendant," could have left no other impression upon the Judge than that it was a record affecting only the property attached, and not creating any personal liability.

The rule of law is well settled that *solemn admissions*, deliberately made by counsel in the progress of a trial, conclude the party making them; and no rule of law ought to be more rigidly applied and strictly enforced. Reliance and credit must be given to admissions thus made, or a wide door will be thrown open for wrong, injustice and fraud. This case illustrates as well the necessity of the rule as its strict enforcement.

It cannot be presumed that the counsel was ignorant of the contents of the record which he offered in evidence, particularly after he was requested to state the purpose for which he offered it, and, having stated the same, was interrogated, by either the Court or the counsel for the plaintiff, to know the nature of the record. He must have known that the *sole purpose of the inquiry was to obtain a truthful and exact knowledge of the record thus offered.* Had the counsel stated that the defendant had actually appeared, by his attorneys, in that action, and filed a plea of the general issue, with notice

of set-off, then it would have been competent for the plaintiff to show any facts that would defeat the record. He might have shown, (if such was the fact,) that a suit had been once instituted by the plaintiff on this very record, in this same Court, and against this same defendant; that the defendant appeared in that suit by the same counsel, and filed a plea of *nul tiel record*, and that the Court, on the trial of that action, sustained that plea, and ordered judgment against the plaintiff, and that the defendant was therefore estopped by his former plea from asserting or claiming said record a binding judgment against him; or the plaintiff might have shown a writ of error sued out and the judgment reversed; or, finding that the defendant had authorized the filing of the plea and set-off, and no withdrawal thereof, and of his appearance, the plaintiff might have then and there taken or submitted to a non-suit. But the statement deliberately made by the counsel at the time he offered the said record, that "*the suit was an attachment suit, and that there was no service of process*" upon defendant, completely deceived and misled the counsel of the plaintiff, and shut off any attempt to explain away the record, or to dismiss, or submit to a dismissal of the action. Had not the presiding Judge and the counsel for the plaintiff a legal right to rely upon a statement thus deliberately made, and to presume that there was nothing in the record offered which would give it any more binding force and effect than a mere attachment suit, without service of process? Had the presiding Judge, or the counsel for the plaintiff, any reason to suppose or presume that the counsel of the defendant had suppressed so important a fact as that the defendant had appeared, by his attorneys, and filed a plea? Would it be anything less than a fraud upon justice, and upon the rights of the plaintiff, now to permit the defendant or his counsel to assert and claim that the record shows an appearance duly entered, and a judgment personally binding upon the defendant, simply because he quietly passed up to the presiding Judge, without explanation, or comment, after having made the statement he did, the instruction which we are now discussing? Consider again the peculiar circumstances under which the statement was made. The question is fairly asked the counsel "to state the object of the testimony."

He does so. He says, one object he has is to show "that said judgment was a bar to a recovery on this note in suit," and in answer to a question from either the Court or counsel, he deliberately states that said suit was "an attachment suit, and that there was no personal service of process on defendant." Could this statement have been understood by the presiding Judge, or the counsel of the plaintiff, to mean anything else than that the record was but a proceeding by attachment? Was not the presiding Judge justified, after such an admission, and with no intimation that the record showed an appearance, in refusing the instruction asked by the counsel of the defendant, that said record was a bar to this action?

In Cornish vs. Abington, 4th Hurl. and N., 549, it is said that "if a party uses language which in the ordinary course of business, and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound, if another, so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he shall do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

Is not this rule strictly applicable to this case? Is it not true that the words "suit by attachment and no personal service," as used by the counsel for the defendant, are "in the ordinary course of business," and the general sense in which they are used by Judges and lawyers understood to mean simply and only a record not personally binding upon the defendant? And did not the presiding Judge "reasonably infer" from such language, that there was no personal appearance by the defendant, and, therefore, is it not true that whether or not, the counsel of the defendant intended no such inference, his statement did have the effect to so impress the mind of the Judge that the record was but an attachment suit that he was compelled to refuse the instruction as asked? Is not that the exact state of this record? Is it not true, therefore, that if the counsel of

the defendant is permitted to urge a reversal of this judgment, because of the refusal to give that instruction, he must be compelled to say something in effect like this :—" It is a fact that I did admit the record to be an attachment suit, without personal service of process, and I made that admission in response to a question propounded to me by either the Court or the counsel of the plaintiff; but I did not mean to be understood as saying that the record did not show an appearance of the defendant; that fact I did not allude to, but suppressed."

The precise question then is, shall the defendant or his counsel be permitted to offer such an excuse ? No Judge or attorney would contend, if the counsel had stated that the record which he offered in evidence showed an appearance by the defendant, and which was not withdrawn by leave of the Court in which the action was pending, that the record was not a bar to this action. This Court, in the case of *Mason vs Eldred*, 6th Wallace, 231, had, prior to this trial, decided that such a judgment was a bar to an action upon a promisory note. And the same case also decides that when there is no personal service or appearance, the judgment has no binding force, and is not a bar to a subsequent action. The presiding Judge was familiar with this decision, and, as he had a legal right to do, treated the record as being just what the counsel of the defendant represented it to be; he relied upon the truthfulness of the representation thus deliberately made.

Upon every principle of estoppel, the defendant and his counsel ought not to be permitted to urge as a reason for the reversal of this judgment, the refusal to give the instruction under discussion.

" An admission," says the Court in *Delzell vs. Odell*, 3d Hill, 215, " by the defendant, intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest unless the defendant be cut off from the power of retraction, is the very definition of an estopel *in pais*."

Admissions made by attorneys duly retained in a cause, have always been treated by the Courts as of the most solemn character. Greenleaf, on Evidence, (vol. 1, sec. 186,) lays down the rule in

these words: "The *admissions* of attorneys of record bind their clients in all matters relating to the progress and trial of a cause, but to this end they must *be distinct and formal*, or such as are termed solemn admissions made for the express purpose of alleviating the stringency of some rule of practice or of dispensing with the formal proof of some fact at the trial; in such cases, they are in general conclusive, and may even be given in evidence upon a new trial."

Vandervoort vs. Smith, 2 Caines' Reports, page 164, was an action on a policy of insurance upon a ship. The insurance covered any risk of any seizure on account of any illicit or prohibited trade except *seizure in port* for that cause. On the trial, the defendant's counsel admitted a seizure *at sea;* a verdict was rendered for the plaintiff. Afterwards, a motion for a new trial was made on the alleged ground of newly discovered testimony, which established that the vessel had been seized in port, and it was contended that the admission, at the trial, of its seizure at sea, ought not to conclude the party. The Court, in its opinion, say: "It is expressly admitted in the case that she was seized at sea; this admission ought to conclude the party on this point."

In *Hoyt vs. Gelston*, 13th Johns, 141, the counsel for the plaintiff, during the trial of the cause, disavowed claiming any damages by way of punishment or smart-money. It was held by the Court, that the plaintiff was concluded by this act of his counsel.

In *Fernald vs. Ladd*, 4th N. H., 370, the rule is laid down that the performance of a stipulation made by an attorney in Court, in relation to an action pending, may be enforced by an attachment.

In *Alton vs. Gilmanton*, 2nd N. H., 520, a written stipulation made by an attorney in the cause, was specifically enforced.

In *Pike vs. Emanerson*, 5th N. H., 393, it was held that an attorney might waive a right of appeal. In that case, a stipulation signed by an attorney had been entered of record, that the judgment should be final and conclusive, and that the plaintiff waived his right of appeal. An appeal was taken, notwithstanding the stipulation. A motion was made to dismiss the appeal, and was granted.

Mere silence of counsel has, under some circumstances, been held to conclude a party. In Morrish vs. Murray 13th Meeson & Welsby, 52, a party was held concluded by *the silence* of his attorney. The case is somewhat peculiar in its circumstances. An action of trespass was commenced against the defendant; a justification was pleaded. The Judge stated that he should leave to the jury to say what damages the plaintiff had sustained by reason of the trespass, in the event the Court should be of opinion that the plea was not proved, and would give to the plaintiff leave to move for a verdict for that sum. No objection was made by the counsel on either side to the Judge pursuing that course, and the jury assessed the damages contingently at one farthing. The plaintiff now sought to set aside the verdict on the ground of misdirection of the Judge. POLLOCK, C. B., says: "The Judge directed the damages to be assessed contingently, with a view to prevent a new trial. * * * * Both sides understood that it was for their mutual benefit, and each was satisfied at the time that the jury intended to do justice. It would lead to great confusion if, under these circumstances, a counsel were afterwards at liberty to object that he had not assented to the arrangement."

ALDERSON, B., said: "A proposal was made, in the presence of counsel on both sides, that the jury should assess the damages contingently; both parties heard the proposal, both took advantage of it, and, therefore, were bound by it for good or for ill, because they both assented to it."

In Booth vs. Clive, (10 C. B.,) 70th Eng. Com. Law, 827, was a similar case, with a similar result.

In Hughes vs. Great Western R. Co., (14 C. B.,) 78th Eng. Com. Law, 637, the Judge non-suited the plaintiff; the counsel took no objection to this course; the Court refused a motion for a new trial.

In Martin vs. G. N. R. Co., (16 C. B.,) 81st Eng. Com. Law, 177, on a rule to show cause why a new trial should not be granted, the counsel for the defendant admitted that an important omission in the charge of the Judge had been observed by himself, and that he consulted with his associate about the propriety of calling the

attention of the Judge to the omission, and, after such consultation "they judged it more prudent not to interpose." The rule for a new trial was denied. CRESSWELL, J., says: "At the trial, the plaintiff's counsel put the case entirely on the ground of negligence on the part of the defendants; and, the defendant's counsel rested their defense upon a total denial of negligence on their part. They did this advisedly, and purposely abstained from suggesting that there had been negligence on both sides, well knowing that if they admitted a *scintilla* of negligence on the defendant's part, their chance of a verdict in their favor was utterly hopeless. *Having deliberately and advisedly taken this course, I think we should be doing the grossest injustice to allow the verdict to be disturbed, merely because the learned Judge, in his summing up, confined himself to points made on the one side and the other.* * * * * *Having made their election as to the issues on which to rest their case, we must hold the parties bound by it.*" CROWDER, J., says: "Whether or not the plaintiff in this case in any degree contributed by his want of care to the accident he complained of was a point very fit to be submitted for the consideration of the jury. But, throughout the case, that point was (avowedly) *intentionally kept out of view by the defendant's counsel. Acting deliberately*, and, no doubt, very properly and very dexterously, they attach the entire blame to the plaintiff himself. That course, *so deliberately taken by the counsel, is adopted by the learned Judge*; and, during the whole summing up, the defendant's counsel never suggested the slightest wish to have the point now in question put to the jury. They clearly cannot be allowed, under these circumstances, now to object that the learned Judge *adopted the line which they themselves advisedly took and pertinaciously adhered to.*"

Maule, B., says: "Here the counsel on both sides were fully cognizant of the circumstance *that a certain question of fact might have been raised upon the evidence;* but nobody raised it, or desired to have it raised. I am not, I apprehend, to be taken as having laid down the law incorrectly, because I followed the same course, *and abstained from raising a point which the defendant's counsel deliberately, as it seems to me, abstained from raising.* It is as if

defendant's counsel had said in so many words, "I abstain from embarassing the jury with any other question than that upon which, upon consideration, I have thought fit to rest my case."

The reasoning of this case goes to this extent, that the Court will hold counsel, in the progress of a trial, to the utmost fairness and candor. They will not permit themselves to be imposed upon or deceived by the silence, conduct, or admissions of counsel. The counsel, in the case above cited, well knew that the learned Judge had omitted an important point in his charge to the jury; nay, more—they had misled the Judge in their argument to the jury; they took no steps to remove any false impressions created by their line of argument; and, designedly, neglected to call the attention of the Judge to the point of omission which they alleged as error. The Court left them where they left themselves.

In this case, the counsel of the defendant, in like manner not only misled the presiding Judge by his method of stating the contents of the record, but by suppressing the fact that a plea had been filed by the defendant, and afterwards withdrawn by the leave of the Court. The suppression of this fact (if it is held to be an appearance) was, under the circumstances, as much calculated to deceive and mislead the presiding Judge as was the neglect of the counsel in the case last above cited, to call the attention of the presiding Judge to the omission in his charge. The record of this cause shows nothing done or said by the counsel to remove the false impression thus created as to the character of the record except to pass up the written instruction, the refusal to give which he now alleges as error. Is the presiding Judge "to be taken as having laid down the law incorrectly," because he correctly ruled upon the record *as it was represented to be* by the very counsel who asked the instruction which was refused? Could the presiding Judge have legally given the instruction if he gave any credence to the deliberate statement of the counsel, made at the time he offered the record in evidence? Has the defendant or his counsel any right "now to object that the learned Judge adopted the line which they themselves advisedly took" when, on the trial, they suppressed such an important fact in the record as the filing of the plea, and repre-

sented the record as a mere attachment suit, without personal service of process? If the English Court left the defendant and his counsel where they left themselves, because they had deceived the presiding Judge by their line of argument and their neglect to call attention to an important omission in the charge, ought not this Court to enforce a like rule in this case? May not this Court well say to the defendant that having deliberately and advisedly taken this course, we should be doing the grossest injustice to allow the verdict to be disturbed. * * * Having made their election as to the issue on which to rest their case, we must hold the parties bound by it? The issue they deliberately made was that the record was an attachment suit, without service of process. They must now be held to that issue. They are concluded by their own admissions and acts from asserting anything to the contrary.

In *Shutte vs. Thompson*, 15th Wallace, 151, the deposition of a witness was offered in evidence; an objection was taken to its admission, on the ground that it did not appear that the witness was sworn to testify the whole truth, nor was there any reasons given why the deposition was taken, and because it was taken before a township Justice, and not by any magistrate described in the act of Congress. It appeared that the depositions had been filed in the papers of the cause more than one year before the trial, and that no exceptions had been taken or endorsed thereon; that the witness was an aged man when his deposition was taken, and had died before the trial, and that no exception was taken until the deposition was offered in evidence by the plaintiff. It also appeared that one of the counsel of the defendant had accepted notice for taking the deposition, and had appeared at the taking thereof and cross-examined the witness. The Circuit Court admitted the deposition. On error to the Supreme Court, that ruling was affirmed. STRONG, J., delivering the opinion of the Court, held that under the circumstances, "*the consent of the defendant to the manner of taking the deposition must be presumed, or a fraudulent attempt to mislead the plaintiff must be conceded.*" On page 159, he says: "A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff

in error did waive his rights under the act of Congress, if he did practically consent that the deposition should be taken and returned to the Court as it was—and if, by his waiver, he has misled his antagonist—*if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objection at all.* If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant *is at liberty to deceive, either actively or passively, his adversary, and a Court, whose province it is to administer justice, will take care that on the trial of every cause, neither party shall reap any advantage from his own fraud.*" In that case, the party was concluded from raising the objections at the trial, because of his appearance at the taking of the deposition and not taking the objections at the proper time and in the proper manner to fairly apprise the opposite party. If the true grounds of the objection had been stated at the time of accepting the notice to take the deposition, or at the taking of the deposition, the plaintiff would have had a full and fair opportunity to have corrected the error. The decision is eminently just. It was evidently a case in which the defendant should have made the objections at an earlier stage in the cause. But how much stronger against the defendant are the facts in this cause ? There was not only a representation made of that character to actually mislead the Court and the counsel for the plaintiff, but there *was a suppression of facts* most important to be known, if the record offered in evidence does show an appearance by attorney, and that appearance not withdrawn by leave of the Court. The admission being to the effect that the suit was by attachment without personal service of process—without a statement that the record showed a plea filed—was as much calculated to deceive the Court, and the counsel of the plaintiff, as if the counsel had declared, in express terms, that the record showed no appearance of the defendant, because the words used would be understood to mean simply and only a suit commenced by attachment.

In *Peck vs. Gurney*, Law Reports, 13th Equity Cases, 119, it is said: "That where a man conceals an important fact, it is virtually equivalent to a representation that the fact concealed does not exist," and in the same case, at page 113, is this language: "A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth or suggesting what was false."

It cannot be successfully urged that this representation and suppression of the facts was cured by the request to charge that the record was a bar to this action. It must be presumed that the learned Judge, when he refused that instruction, had in mind the record *as it was deliberately represented to be*, and the case, in this respect, must be treated the same as if the record had been only a suit by atachment.

No other, or different explanation of the character of the record was given. The instruction was properly refused upon the ground that the record of a mere attachment suit would not be a bar to this action, and to allow the defendant, after such an admission, under such circumstances, to quietly pass up to the presiding Judge, without word or comment, an instruction that such a record as he had represented it to be was a bar to the action, and to claim that the refusal to give it was error, *because it now appears that the record shows a plea filed and withdrawn, and therefore an apperance of the defendant such as to make it personally binding upon him, would be to* IMPUTE FRAUD AND TRICKERY *to the objecting party, and would allow that party to* REAP AN ADVANTAGE FROM HIS OWN FRAUD, for, as has been heretofore stated in this brief, had the exact truth been told, the plaintiff might have obviated the effect of the record by showing such a state of facts as would estop the defendant from asserting such a record, or, that the judgment was reversed on a writ of error; or the plaintiff might then and there, if the presiding Judge had held the record a bar to this action, dismissed the suit. But *because of the representation made, and of the suppression of the facts which it is now claimed show an appearance of the defendant, the plaintiff had no opportunity to make these defences, and saw no reason for then and there dismissing the suit.*

It may be urged that because the record was admitted in evidence, the presiding Judge ought himself to have examined it before refusing the instruction. This reason should have no weight, in view of the representation made by the counsel at the time he offered the record in evidence. "No man," says *Kerr*, on Fraud and Mistake, page 81, "can complain that another has relied too implicitly on the truth of what he himself, stated." In *Rawlins vs. Wickham*, 60th Eng. Ch., 313, it was urged that a party, who had been defrauded by a false representation as to the value of a copartnership, ought to have examined the books, and from them learned the true facts. The opinion says: "He was entitled to believe the representations to be accurate without looking at the books." Was not the presiding Judge authorized to believe the representation without examining the record, that the suit was an attachment suit without personal service of process ?

We think the defendant must be deemed to have waived any right to now insist that the record offered in evidence shows an appearance, and must be concluded by the representation made, and upon the faith of which the presiding judge and the counsel of the plaintiff acted and if so, then there is no error of which the defendant can complain, in the refusal to give the instruction asked, that the said record was a bar to this suit on this note.

2nd. A second reason why there was no error in the refusal to give the instruction that "the record of the suit in Wayne County, Michigan, was a bar to this action on this note," is, that it appears, from the record, that Walker & Kent, *before the trial*, and on their motion, were permitted *to withdraw the plea they had filed.* The entry in the record is in these words: "This cause coming on to be heard, the plea of the defendants heretofore pleaded by them is withdrawn, on motion of Walker & Kent, their attorneys," (folio 57, page 35.) This order was made "at a session of the Circuit Court." Is not this equivalent to an order made by leave of the Court to withdraw the appearance ? The only appearance entered by the defendant was by the filing of the plea. The Court, upon motion of the defendant's attorneys, permits the plea to be withdrawn. Is not that the same, in legal effect, as if the order

had been that the defendant have leave to withdraw his appearance? There is no doubt that a Court in which an action is pending has the right to permit a party to withdraw his appearance, and if the withdrawal is allowed, the order must be held conclusive until vacated or set aside by a proper proceeding. It cannot be reviewed in another and different action, in another Court.

In *Forbes vs. Hyde*, 31st Cal., 346, it appeared that an answer was inadvertently filed for all the defendants in the suit. The attorneys, upon discovering the mistake, made application to the Court to withdraw *the answer* and file another, limiting their appearance to the defendants whom they represented, and for whom they intended to answer. The motion was granted. In another action the record was offered in evidence. It was objected to on the ground that it appeared the Court had never acquired jurisdiction of the person. The objection was overruled, and the record was admitted in evidence in the lower Court. On error, it was held improperly admitted. The opinion says, as to the *effect of the withdrawal of the answer:* "Upon the discovery of the mistake, upon application, and a proper showing promptly made to the Court, and by order of the Court, the mistake was corrected and the answer, and *consequently the appearance involved in the filing, were withdrawn.* After the correction of this mistake, *the record, in legal contemplation, stood as though it had never occurred, and there can be no reasonable ground for holding that the Court, after the answer was thus withdrawn, had jurisdiction, in consequence of the inadvertance. The plaintiff was in no way injured.* The way was open to him to proceed in the proper mode, as he had before commenced to do, to obtain jurisdiction, and he did proceed, in all respects, as though no answer had been filed."

This case is directly in point. It does not appear upon what grounds Messrs. Walker & Kent asked leave to withdraw the plea they filed, nor are the reasons material. It is the fact that the plea is withdrawn by leave of the Court, and not the reason for it, that is important. The fair inference from the statement of the record is that the plea was withdrawn by leave of the Court. The Court was in session—the Judge was present and presiding—and *upon the*

motion "coming on to be heard," the plea is withdrawn. The record, after this motion was granted, stood as though no appearance had ever been entered. And there can be no "reasonable ground for holding that the Court, after the plea was thus withdrawn, had jurisdiction" of the defendant.

In *Dubois vs. Glaub*, 52nd Penn., 242, STRONG, J., uses this language, as to the withdrawal of an appearance and plea: "To us, the withdrawal of the appearance and plea appears to have been a device to postpone a trial. However that may have been, *after the appearance was withdrawn, the record stood as if none had ever been entered*, and we are not prepared to say the Court had then no power to give judgment *for default of appearance.*"

In *Lodgers vs. The State Bank*, 6th Blackford, 558, parties were permitted to withdraw their plea and appearance. BLACKFORD, J., says: "The record, however, shows that the appearance and plea were withdrawn, which left the case as if there had been no appearance and plea."

In *Michew vs. McCoy*, 3d Watts & Serg., 502, the Court permitted the defendant's attorney to withdraw the appearance and plea at the trial. GIBSON, C. J., says: "Now, to say nothing of the want of an affidavit of service, which would have offered a decisive objection to such a step in the first instance, it is sufficient to say that when the exigency of the suit has been answered by an appearance recorded, but subsequently vacated by the attorney's death, removal or retirement from Court, the course is not to sign judgment for what the client could not prevent, *but to rule him into Court by a fresh appearance in person or by counsel, for there must always be an appearance by party, or by counsel responsible for him to the Court.*" * * * "If the plaintiff has been delayed in this instance, it has been his own fault, for it is not to be believed that the Court would have suffered the appearance to be retracted against his consent. That done, however, nothing remained but to rule the defendants into Court, to try the cause in the usual way." Judgment had been entered against the defendant. It was reversed, because there was no appearance after the same was withdrawn by leave of the Court.

These cases settle the question that the record is not a bar to this action. The plea being the only appearance entered by the defendant, and having been withdrawn by leave of the Court, the suit then stood the same as if no appearance had been entered, and the presiding Judge was clearly right in refusing the instruction asked by the defendant.

The record is not a bar to the action. After the withdrawal of of the plea, it had only the force and effect of a mere attachment suit, without personal service of process.

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